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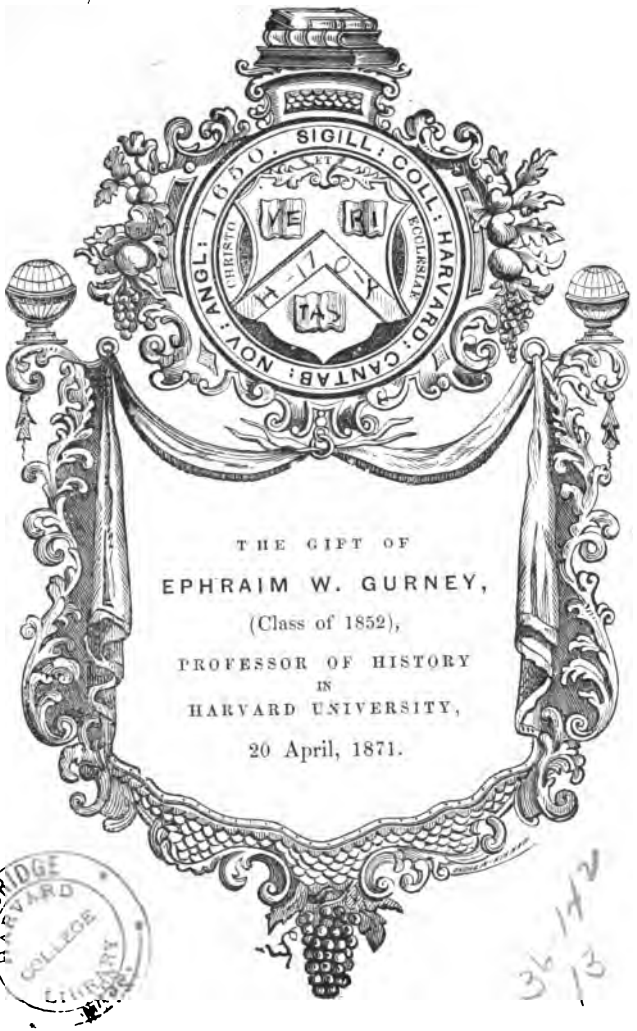

THE GIFT OF
EPHRAIM W. GURNEY,
(Class of 1852),
PROFESSOR OF HISTORY
IN
HARVARD UNIVERSITY,
20 April, 1871.

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NATIONALITY:

OR THE

LAW RELATING TO SUBJECTS AND ALIENS,

CONSIDERED

WITH A VIEW TO FUTURE LEGISLATION.

BY
THE RIGHT HON. SIR ALEX. COCKBURN,
LORD CHIEF JUSTICE OF ENGLAND.

LONDON:
WILLIAM RIDGWAY, 169, PICCADILLY, W.
1869.

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INTRODUCTION.

It seems to be admitted on all hands that the law of England respecting nationality, with reference to the circumstances under which the status of a subject arises, or may be acquired, or, on the other hand, may be put off, together with the law relating to the disabilities of aliens, requires to be considered with a view to its alteration and amendment. The conflict between the law of England and that of so many of the leading nations of the world as to the origin of nationality, and the inconvenience to which such conflict may give rise, as well as the inconsistency of our rule as to the immutability of allegiance, at a time when emigration from this country to America is annually taking place on so large a scale, are now so sensibly felt, that an alteration of the law has become inevitable. The observations of one of the ablest public writers of the present day in the columns of the *Times*, the recent Report of the Committee on Foreign Affairs of the House of Representatives of the United States on the rights of American citizens in foreign states, and the discussion of the subject by the press, having had the effect of directing public attention to the subject, a Royal Commission was appointed in May, 1868, to inquire and report on the laws of naturalization and allegiance. The Commissioners appointed under that Commission have

recently made their report, and have suggested certain amendments in the existing law. Some of their recommendations everyone will approve of. Others may be open to exception. In one highly important particular the report falls short of what, in the opinion of the minority of the Commission, it would have been expedient to recommend. As to this, a separate report having been sent in, with reasons for the difference of opinion, the public can judge for themselves. The Commissioners have supplied us with information which will be eminently useful in forming an opinion as to what is really required to be done in the way of alteration of the law. They have collected and published in the form of an appendix to the report a considerable body of valuable information as to the law of the various nations of Europe and America on the important subjects with which the Commission had to deal. Unfortunately the information thus furnished is not embodied in the report, and it is probable that but few persons will proceed further than the report, or take the trouble to go through the numerous documents contained in the appendix. Yet a knowledge of these matters is necessary to the proper understanding of the subject in all its bearings, it being important to see how the law of this country conflicts with that of other nations, and to appreciate the embarrassment and inconvenience which arise from this antagonism. This is the more necessary as the report of the Commissioners, however excellent in some respects, when the subject is looked at by the light thus thrown on

it, is not altogether satisfactory, and will leave at all events one great source of difficulty unremedied.

Under these circumstances, it has occurred to the writer that it might be useful to place before the public, so far as is necessary for the present purpose, the law of other countries on the subject of nationality, as collected from foreign codes and from the materials furnished by the Commissioners, to contrast those laws with our own, and to offer in a condensed form the information scattered over the pages of the appendix, not always in the most systematic manner, as to the instances in which embarrassment has arisen from the working of conflicting laws.

With these data before us, we shall be better able to judge between the opposite opinions of the two sections of the Commissioners, and to consider what ought properly to be done in the way of legislation, in order to place the law relating to nationality on a sound and satisfactory basis, so as at the same time to avoid collision with other nations, and to protect individuals against conflicting claims to their allegiance. We shall be then able to judge how far it is important, in order to prevent misunderstanding between governments, that the law relating to nationality should be uniform among civilized nations, and to form a rational opinion as to what the law ought to be, and what we ought to invite other nations to make it.

CHAPTER I.

NATIONALITY.

NATIONALITY, or, in other words, the status of an individual as subject or citizen in relation to a particular sovereign or state, is either natural or acquired: natural when it results from birth; acquired when an individual is accepted as subject or citizen by a State to which he did not originally belong.

SECTION 1. *Nationality of Origin.*

Nationality by birth or origin depends, according to the law of some nations, on the place of birth; according to that of others on the nationality of the parents. In many countries both elements exist, one or other, however, predominating. Thus, by the law of England, the status of a subject depends generally on the place of birth: nevertheless, the descendants of a natural-born subject, for two generations, though born out of the dominions of the Crown, are, to all intents and purposes, subjects. In like manner, by the law of France, though, generally speaking, it is necessary to be born of French parents to be a Frenchman, an exception is made in favour of the child of a foreigner, if born in France, subject only to the condition of the French nationality being claimed within a prescribed period.

Section 2. *Law of Great Britain.*

By the Common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject; save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality.

This rule, when originally established, was not unsuited to the isolated position of this island, and the absence of intercourse with foreign nations in Saxon times. No children of English parents being born abroad, or children of foreign parents being born within the realm, the simple rule that to be born within the dominions of the Crown constituted an Englishman answered every purpose. But when the foreign possessions of our kings and the increase of commerce had led to greater intercourse with the Continent, and children of English parents were sometimes born abroad, the inconvenience of the rule which made the place of birth the sole criterion of nationality soon became felt.

It appears from the Parliamentary Rolls of the reign of Edward III., that as early as the 17th of that king (1343), doubts having arisen whether even the king's sons born without the realm could inherit, the

Archbishop of Canterbury brought the question before the Lords. The Lords replied unanimously that there was no doubt that the king's sons could inherit, wherever born, but that with regard to children of other persons there were great difficulties in deciding the question. The matter was again brought before the Lords and Commons jointly, who concurred in the opinion previously given by the Lords, and recommended that a law should be passed on the subject; but, as Parliament was about to be prorogued, "et "ceste besoigne demand grant avisement et bone de- "liberation coment ele se purra mieltz faire, et plus "surement," the further consideration of it was deferred.*

Owing to the plague, legislation on this and other subjects was not resumed till the year 1350, when the Act 25 Edward III. stat. 2 was passed, entitled "A statute for those that be born beyond sea." By this statute it is provided "that all children inheri- "tors which from henceforth shall be born without "the legiance of the king, whose fathers and mothers "at the time of the birth be and shall be at the faith "and legiance of the King of England, shall have "and enjoy the same benefits and advantages, to have "and bear the inheritance within the same legiance, "as other inheritors aforesaid in time to come; "so always the mothers of such children do pass the "sea by the license and wills of their husbands."

* Rotuli Parliamentorum, vol. ii. p. 139. Appendix to Report of Commissioners, p. 6.

It has been said that this statute was only declaratory of the Common law.* But this view is hardly consistent with its language, which is prospective, and refers only to children which "from henceforth shall be born;" and it has been pertinently observed that if the statute had only been declaratory of the Common law, the subsequent legislation on this subject would have been wholly unnecessary.

The Act of the 25 Edw. III, as hereinbefore set forth, refers, as has been seen, to children *inheritors.*

The Statute of the 7 Anne, c. 5, the principal purpose of which, however, was to naturalize all Protestants within the realm, contained a more general enactment. By section 3 of this statute, "the children of all natural-born subjects, born out of "the legiance of Her Majesty, her heirs and succes- "sors, shall be deemed adjudged and taken to be "natural-born subjects of this kingdom to all intents, "constructions, and purposes whatsoever."†

The Act of the 4th Geo. II, c. 21, purporting to explain the foregoing clause, enacts that "all children born out of the legiance of the Crown of England, or which shall hereafter be born out of such legiance, whose fathers were, or shall be, natural-born subjects of the Crown of England, or of Great Britain, at the time of the birth of such children respectively, shall and may, by virtue of the

* See what is said by Lord Bacon when arguing as counsel in Calvin's case, 2 State Trials, p. 585.

† With the exception of this clause, the Statute in question was repealed by the 10th Anne, c. 5.

said recited clause in the said Act of the seventh year of the reign of Her said late Majesty and of this present Act, be adjudged and taken to be, and all such children are hereby declared to be natural-born subjects of the Crown of Great Britain, to all intents, constructions and purposes whatsoever."

A later Statute, that of the 13th Geo. III, c. 21, went still further, and enacted that all persons whose fathers were by the Act of Geo. II entitled to the rights of natural-born subjects, should be adjudged natural-born subjects also; thus extending the provisions of the Act of George the Second to the grandchildren of natural-born subjects.

An exception is made by the 4 Geo. II, c. 21, in the case of those whose fathers, at the time of the birth of such children respectively, were or shall be attainted of high treason by judgment, outlawry, or otherwise, or were or shall be liable to the penalties of high treason or felony in case of their return without the royal licence to the United Kingdom, or whose fathers, at the time of the birth of such children respectively, were or shall be in the actual service of any prince or state at enmity with the British Crown.*

Such remains the law to the present time. All

* The abjuration by a British subject of his allegiance to the Crown, and his promise of obedience to a foreign state, although it might have rendered him liable, under the 3 James I, c. 4, s. 22, 23, to the penalty of high treason, does not divest him of his character of a British subject, and therefore does not disqualify the children or grandchildren of such British subject to be British subjects. See Fitch *v.* Weber, 6 Hare, 51.

persons born within the dominions of the Crown, (with the very limited exception before stated), whether of British or foreign parents, and all persons being the children or grandchildren of British parents, though born within the dominions of a foreign state, are to all intents and purposes British subjects, and owe allegiance to, and are entitled to protection from, the Sovereign of these realms.

It was at one time thought that children born abroad, of an English woman married to an alien, were entitled to the benefit of the statute of the 25 Edw. III., and were to be considered as British subjects.* This doctrine is however now exploded, the Court of Queen's Bench having decided, in the case of Duroure *v.* Jones,† that the son of an alien father, born of an English mother, out of the king's dominions, could not inherit an estate in this country in right of his mother. But, now, by the statute of 7 & 8 Vict. c. 66, § 3, such children, though not made British subjects, are declared capable of taking real or personal estate by devise, purchase, inheritance or succession.

To this should be added, to complete this sketch of of the law of England on this subject, that, contrary to the law of all other nations, except those which have followed the English law, marriage, by the common law, had no effect on the nationality of women. An English woman marrying an alien still remained a British subject: an alien woman marrying a Bri-

* See Bacon's Abridgement, Tit. Aliens A.

† 4 Term Reports, p. 300.

tish subject, remained none the less an alien;* until the latter anomaly was cured by the Act of 7 and 8 Victoria, c. 66, the 16th section of which provides that "any woman married, or who shall be married "to a natural born subject or person naturalized, "shall be deemed and taken to be herself naturalized, "and have all the rights and privileges of a natural "born subject."

Such being the law of this country as to nationality of origin, it next becomes important to see how far it agrees with or differs from the law of other countries.

Section 3. *Law of the United States.*

The law of the United States of America agrees with our own.† The law of England as to the effect of the place of birth in the matter of nationality became the law of America as part of the law of the mother country, which the original settlers carried with them. The extension of citizenship to persons born of American parents out of the territories of

* Co. Lit. 31 *b*.—"A French woman becomes in no way a "British subject by marrying an Englishman; she continues an "alien, and is not entitled to dower;" per Parke B., Countess of Conway's case, 2 Knapp, P. C. C. 368. So, in delivering the judgment of the Privy Council in the Countess de Wall's case, Lord Campbell says, "the 7 & 8 Vic. c. 66 § 16, is not a de- "claratory Act, and we consider it to be quite clear that at "common law, not only was an alien woman married to an Eng- "lishman incapable of taking dower, but while she remained "abroad, she was not within the allegiance of the crown of "England."—12 Jurist, 348.

† Kent's Commentaries, vol. ii. p. 1.

the States was effected by a Statute of 1855.* But the privilege is limited to one generation, unless the parents have resided within the States, there being an express provision "that the rights of citizenship shall not descend to persons whose fathers never resided in the United States."

With regard to the nationality of women, the law of America, previously identical with our own, has been amended by the same statute, which enacts, in section 2, that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.

Section 4. *Law of the Continental Nations.*

In marked contrast to the law of England and America, the nations of continental Europe make nationality depend, some exclusively, all principally, on the nationality of the parent. As a general rule, the nationality of the child follows that of the parents, the place of birth being immaterial. In no country is the child of a subject other than a subject, by reason of having been born out of the dominions of the particular country.

Such, however, was not the ancient law of the continental nations universally. On the contrary, in some at least, if not in all, birth within the dominions of the particular country, as well as parentage, determined the nationality of the individual.†

* 10 Statutes, 604.

† The eminent jurist, Mons. Demolombe, speaks of this rule as a "règle Européenne."

By the law of France, anterior to the revolution, a child born on French soil, though of foreign parents, was a Frenchman, as it was termed, *jure soli;* a child born of French parents out of French territory, was a Frenchman *jure sanguinis.*† The framers of the Code Napoleon, adopting a sounder principle, excluded the place of birth as the source of nationality in itself; but compromising, as it were, with the old rule, they allowed the place of birth to have effect so far as to give to the offspring of an alien the right of claiming French nationality on attaining full age. The example set by the framers of the French code has been followed by the nations by which that Code has been adopted, as also by others in remodelling their constitutions or codes. The result has been that, throughout the European States generally, descent, and not the place of birth, has been adopted as the primary criterion of nationality, though with a reservation, in some, of a right to persons born within the territory to claim nationality within a fixed period. Thus, while in some of these countries nationality is derived from parentage alone, in others the right becomes complicated by reason that, in addition to parentage, birth within the dominions of the particular country confers citizenship on the offspring of alien parents—in some absolutely—though subject to the right of the individual concerned to reject it at majority—in others on the right being claimed on certain specified conditions.

† Demolombe, Cours de Code Napoleon, vol. i. sec. 146; Pothier, des Personnes, Tit. 2, sec. 1; Bourjon, Droit commun de la France, Liv. i. Tit. 7, sec. 2, No. 27.

The German States (with the exception of Baden), Sweden, Norway, and the Swiss Confederation, constitute the first class; Denmark, Portugal, and Holland, the second; France, Belgium, Spain, Italy, Greece, the Grand Duchy of Baden, Russia, Russian Poland, and the Ottoman Empire the third.

According to the Austrian Code, State-citizenship is the right of the child of an Austrian citizen, wheresoever such child may be born.*

In Prussia, as appears from a law of December 31, 1842, Article 12, every child of a Prussian subject is by birth a Prussian subject, wheresoever born.

In neither of these states does birth within the country confer any right.

In Bavaria, Saxony, Wurtemberg, and the minor German States, except Baden, as appears from information obtained by the British Government through its diplomatic agents, and set out in the Appendix to the Report of the Commissioners, the law is the same.

The law of Sweden stands on the same footing; the character and status of a Swedish subject is derived from parentage alone, irrespective of the place of birth.† The law of Norway is the same.‡

* Allgemeines Bürgerliches Gesetzbuch, s. 28. Ellinger, Handbuch des Oesterreichischen allgemeinen Privatrechts, p. 35.

† Appendix to Report, p. 148. St. Joseph, Concordance des Codes, vol. iii. p. 4.

‡ St. Joseph, Concordance des Codes, vol. iii. p. 1. Norway, though united with Sweden, has its own law.

So also the child of a Swiss is a Swiss, wheresoever born: the child of an alien, though born in Switzerland, is not the less an alien.*

Denmark, Portugal, and Holland are the only continental states in which, in addition to nationality from descent, the circumstance of having been born within the territory gives to the child of an alien the character and status of a subject, without the necessity of claiming it.

In the first of these countries, by a law similar to ours, the child of an alien, born within the Danish dominions, is a Dane. This, however, is subject to the condition of his continuing to reside in Denmark. If he quits the country, the character of a Danish subject is lost.† Whether it would revive on his returning does not appear.

By the law of Portugal, the child of alien parents,

* Appendix to Report, p. 148.

† There seems to be some uncertainty as to the state of the Danish law on this head. The law, as stated in the text above, is taken from an opinion of Mr. Brock, an advocate of the supreme Court at Copenhagen, transmitted by Sir Chas. Wyke, and printed at page 143 of the Appendix to the Report of the Commissioners. But in a letter from Count Frijs to Sir Chas. Wyke, of the 25th June, 1868, printed at p. 116 of the Appendix, it appears that the rule that birth within the kingdom gives to the children of aliens the character of Danish subjects applies only where the parents are permanently residing in the country.

By a decree of 1776, referred to at page 66, and which appears to be still in force, the children of foreigners, born in Denmark, can claim the rights of Danish citizens after a permanent residence in the country up to their eighteenth year.

born within the Portuguese dominions, is a Portuguese subject, unless he declares, when of age or emancipated, or through his parents or guardian if a minor, that he does not wish to be a Portuguese. In the latter case, however, on coming of age, or when emancipated, he may, by means of a new declaration, recall that which has been so made on his behalf.* If, however, the mother be a Portuguese, and the father has his property and domicile in the country, and has lived in it for ten years consecutively, the child will be a Portuguese without such option.†

By the law of Holland, in addition to children of Dutch parents, wheresoever born, any person born of foreign parents, either in the kingdom, or out of it, becomes a Dutch subject, if, either the parents were domiciled within the kingdom at the time of the birth, or the person in question, after attaining the age of twenty-three years, declares his intention of remaining in the country and establishes his domicile there.‡

We pass on to the States in which, in addition to the right by parentage, birth within the territory gives the right to claim the status of a subject.

The law of France makes the child of a Frenchman, whether born within French territory or in a

* Civ. Code, Tit. 11. Art. 18. No. 2. Appendix to Report, p. 145.

† St. Joseph, Concordance des Codes, p. 138.

‡ Law of 28 July, 1850. Appendix to Report, p. 145.

foreign country, a Frenchman;* unless indeed, the father at the time of the child's birth beyond the territory has lost his rights as a Frenchman; in which case the child's position is that of the child of an alien.†

The law of Belgium, as also that of Greece, coincides in these particulars with the law of France; as does also that of Spain.‡

The law of the new kingdom of Italy is in both respects the same;§ except that it further reserves to the child of a father who has lost his citizenship before the birth of the child, the right of citizenship, if the child is born within the state and resides in it; leaving it, however, at his option when of age, to take the quality of an alien, on making a declaration to that effect. If born abroad, the child of a father so circumstanced will be an alien; but he may become a citizen if he makes a declaration to that effect, and fixes his domicile in the kingdom within a year from the declaration. If he accepts state employ, or serves in the army or navy, or submits to the conscription without claim-

* Code Civil, Art. 10.

† Ib. Art. 10. Appendix to Report, pp. 27, 143.

‡ Constitution of 1845, Art. 2. Royal decree of 17th Nov. 1852, Arts. 3 & 4. Appendix to Report, p. 147.

As the law stood under the constitution of 1845, persons born within the dominions of Spain of alien parents were Spaniards; but this is altered by Art. 3 of the Decree of 1852, and such persons must now claim Spanish nationality in order to become Spaniards.

§ Codice Civile, Art. 4.

ing exemption on the plea of being an alien, he is considered a citizen without further formalities.*

But in all the countries in this class, while parentage is the primary source of citizenship, birth within the territory of the state gives, (as has already been said,) to the children of aliens a right to claim to be subjects.

By the law of France, every person born of foreign parents in France is entitled, within a year after attaining his majority, to claim the quality of a Frenchman, provided that, if residing in France, he declares his intention of fixing his domicile in the country, or that, if resident out of it, he makes his submission to fix his domicile in it, and actually settles there within a year from the act of submission.† If he has served in the French army or navy, or submitted to the conscription law without asserting his character of alien, he is not limited to the year ensuing on his majority, but may claim nationality, on the conditions stated, at any time.‡ On the other hand, by a law of 1851,§ the grandchild of a foreigner, if the father was born in France, becomes, from the mere fact of birth in France, a French subject, unless within a year after attaining majority, he disclaims that character, and declares before the prescribed authority his desire not to become a Frenchman.

* Codice Civile, Arts. 5 & 6.

† Code Civil, Art. 9.

‡ Decree of 22nd March, 1849.

§ Dixième Série, No. 2730. Appendix to Report, p. 20.

The law of Belgium is the same as that of France, except that when the alien parents are domiciled in Belgium, the child is not limited to the year following his majority to claim citizenship.* The law of Greece, in this particular, is precisely the same as that of France.†

By the Italian Code, the child of an alien, if the latter has had his domicile established within the kingdom for ten years uninterruptedly, is a citizen, unless he elects to be an alien, and makes the prescribed declaration accordingly. If the alien father has not been domiciled for ten years, the child is considered an alien, unless he elects, as he may do, to become an Italian citizen, and makes a declaration to that effect before the proper authority.‡

By the law of Spain, the children of aliens, if born within the Spanish dominions, may, in like manner, claim to be Spaniards. So also may the children of an alien father and Spanish mother, though born out of the dominions; as also those born out of the dominions of Spanish fathers who have lost their nationality.§

In the Grand Duchy of Baden, a person born of a foreign parent in the country may claim the rights of a subject within a year after attaining the age of 21, on condition of promising to fix his abode in the

* Appendix to Report, p. 27, 142.

† Ib. p. 143.

‡ Codice Civile, Arts. 8 & 9.

§ Royal Decree of of 1852, Arts. 2 & 3. Appendix to Report, p. 29, 148.

duchy, and settling there within a year. But the Government may reject the claim whenever the alien possesses the right of nationality or a fixed abode in another State.*

The law of Russia is liberal in according nationality to the children of aliens. While it makes Russian nationality depend, in the main, on descent, it reserves the right of claiming it to the children of alien parents, not only if born and educated within Russian territory, but also, though born out of it, if they have completed their education at a Russian upper or middle school. In both cases the desire to become Russian subjects must be declared within a year after attaining majority.†

The law of Russian Poland (which is distinct from that of Russia), acknowledges as Polish subjects not only the children of Poles, wheresoever born, but also the children, wheresoever born, of foreigners domiciled in Poland. It allows the child of a Pole, who has lost his quality of Polish citizen, to claim citizenship, on declaring his intention to reside in Poland, and that he desires to be a subject of the kingdom.‡

By the law of the Ottoman Empire, as declared by a decree concerning Ottoman nationality, of the 19th of January, 1869,§ the nationality of the parents, or of

* Badisches Landrecht, § 9, 9 (a).

† Appendix to Report, p. 26.

‡ St. Joseph, Concordance, Tit. I. Ch. 1, Art. 9.

§ A French translation of this law and of a circular to the Governors General of the Provinces, explaining it, has been fur-

the father alone, determines that of the child, irrespective of the place of birth. But a person born of an alien on Turkish territory may, within three years after coming of age,* claim to become an Ottoman subject.

SECTION 5. *South American States.*

The laws of the South American States with reference to nationality of origin remain to be noticed. In those states which were under the Government of Spain, the old Spanish law prevailed; according to which law, as stated by a learned French jurist,† birth within the territory was necessary to citizenship. Natural subjects were those who were born within the country, of fathers themselves born therein: the children of an alien might however acquire by birth the status of citizenship, if the father had been domiciled and had resided in the country for ten years.

Since these countries threw off the dominion of Spain, and established themselves as independent States, several of them have legislated for themselves on the subject under consideration.

By the constitution of Columbia the offspring of Columbian parents born abroad acquire the character of citizens on being domiciled within the country.‡

In Venezuela, by Article 6 of the Federal Consti-

nished through the favour of His Excellency Musurus Pasha, the Ambassador of the Ottoman Porte.

* By this law the period of majority is made to depend not on the law of Turkey, but that of the country of the alien.

† Mons. St. Joseph, Concordance des Codes, vol. ii. p. 2.

‡ Appendix to Report, p. 65.

tution, all persons are declared to be Venezuelans: 1, who are born within the territory of Venezuela, whatever may be the nationality of their parents; 2, who being the children of a Venezuelan father, or Venezuelan mother, fix their residence in the country, and express their desire to be considered as such.*

The modern Code of Bolivia declares to be Bolivians: 1, all persons who are born within the territory of the Republic, of Bolivian parents; 2, all persons born out of the territory, of Bolivian fathers employed in the service of the State; 3, persons born of Bolivian parents, domiciled abroad, but who have not lost their character of Bolivian subjects, and who return before the expiration of ten years; 4, persons born of alien fathers within the Republic, who have resided in the country, and declare their intention of fixing their domicile in it; or who, not having resided in the country, declare, within a year of their coming of age, their intention of becoming Bolivian subjects and of fixing their domicile in Bolivia, and so fix it accordingly. Lastly, the children of Bolivians who have lost their nationality may become Bolivians on complying with the last-mentioned conditions.†

The Argentine Republic has given to the children of aliens, born within the territory, the option of taking Argentine citizenship or of adhering to that of their fathers.‡

* Ib. p. 77.

† Civil Code of Bolivia, Arts. 15 & 16. St. Joseph, Concordance, vol. ii. p. 68.

‡ Appendix to Report, p. 61.

In Brazil, the law of Portugal originally prevailed; but by the present Constitution all persons are Brazilian subjects: 1, who are born in Brazil, being either free or freedmen, although the father be a foreigner, if not resident in the service of his nation; 2, children of Brazilian parents, though born in a foreign country, if they become domiciled in the country; 3, children born abroad of a Brazilian father in the service of the Emperor, even though they do not afterwards acquire a Brazilian domicile.*

SECTION 6. *Nationality of Married Women abroad.*

Before quitting this branch of the subject, it is necessary to say a word as to the nationality of married women in other countries. In every country, except where the English law prevails, the nationality of a woman on marriage merges in that of the husband: she loses her own nationality, and acquires his; whereas, by the law of England, though, as has already been pointed out, since the Act of 7 & 8 Vict. c. 66, an alien woman marrying a British subject becomes naturalized, an English woman marrying an alien still remains a British subject. The law of America is the same. An American woman married to a foreigner retains her American nationality.

Hence, so long as the common law remained unaltered, arose this singular result, pointed out by Mons. Demangeat in his notes to Fælix.† While an English woman, on marrying a Frenchman, became a Frenchwoman, without ceasing to be a British subject, and

* Constitution of Brazil, Art. 6. Appendix to Report, pp. 63. 64.

† Vol. i. p. 82, note *a*.

so acquired a second nationality, a French woman, on marrying a British subject, while she acquired no British nationality, by the operation of the French law, lost her own, and thus ceased to belong to any nation at all. The latter anomaly has been cured; the former remains.

On the other hand, provision is made in all the Continental codes for enabling a woman, whose nationality of origin has thus been changed into that of her husband, to resume, if so minded, her original nationality on becoming a widow; on the condition, however, if not resident in the country of origin, of returning to it, for which, in some instances, the authority of the State is required.

The nationality of a married woman being thus merged in that of the husband, it follows that where nationality is made to depend on descent, the nationality of the father is all that need be looked to, so far as the case of legitimate children is concerned. On the other hand, the nationality of natural children depends on that of the mother, except, indeed, where, as can be done by the Continental law, as distinguished from that of England, the father by subsequent marriage, or by formal recognition, legitimizes the offspring.

Wherever the parents are unknown, they are presumed to have belonged to the country in which the child is found; so that the child of unknown parents always takes the nationality of the country in which he is first found.

These provisions are common to all the Continental codes.

CHAPTER II.

NATURALIZATION.

SECTION 1. *Conflict of Laws respecting it.*

IT is obvious that from the variety and conflict of laws thus shown to exist, serious embarrassment and difficulty may arise, on the one hand, to individuals, by their being exposed to conflicting claims on their allegiance as subjects, on the other to Governments, by claims being made on them for protection by individuals desirous of escaping from burdens or liabilities sought to be imposed on them as the subjects of some other State. But the matter becomes far more complicated, and far greater difficulty arises from the practice, in modern times so extensively used, of one State conferring its nationality on the subjects of another, and thus allowing a second or acquired nationality to be, according to the law of some, substituted for, according to that of others, superadded to, the nationality of origin—a proceeding known by the name of naturalization. Unfortunately, though the practice is universal, the conflict existing between the laws of different nations is very great—there being hardly any two which can be said altogether to agree—and this conflict may easily lead, as it already has led, to misunderstanding and dispute. The mode by which, and the conditions under which, this second nationality may be acquired, and its effects when acquired, differ in almost every country, and the conflict of laws thus arising has

been, and is perpetually liable to be attended with embarrassment and difficulty.

Naturalization is, in every country, attended with the obligation on the part of the adopted subject of swearing allegiance to the Sovereign or State which receives him. In some countries naturalization is conditioned on the party seeking it renouncing his original allegiance; in others it is granted without any regard to such a condition, or to whether by the law of the country of birth the party can get rid of his original nationality or not; or whether, if the consent of the State is necessary, such consent has been given; and lastly, without any regard to the position in which it may leave the party naturalized in relation to the Government whose subject he originally was.

In some States the subject is allowed to divest himself of his nationality of origin with perfect freedom; in others he can only do so with the consent of the Government; in others he can only do so after the fulfilment of certain duties and obligations; in others his allegiance to the sovereign remains unchangeable, and cannot under any circumstances be put off by any means short of a positive Act of legislation.

It is plain that when the subjects of a State in which the last mentioned law prevails become naturalized elsewhere, a very serious conflict of jurisdiction may easily arise.

Section 2. *British Naturalization.*

In this country, naturalization has existed from an early period under two forms. It might be conferred,

1, by the Sovereign by virtue of the prerogative; 2, by Act of Parliament. The first, as distinguished from the second, is known under the name of denization, and persons acquiring the character of subjects under it are termed denizens. When the status of a British subject is conferred by Act of Parliament the proceeding is termed naturalization. Denization can only be effected by letters-patent from the Sovereign; naturalization only by, or under, an Act of the legislature.

The difference between the two in point of effect is of a substantial character. Denization has no retrospective operation, while by naturalization, conferred by Act of Parliament, the alien was placed in exactly the same position as if he had been born a subject. A denizen is thus in an intermediate position between an alien and a natural-born subject, and partakes of both these characters. He may take lands by purchase or devise, which an alien may not; but he cannot take by inheritance: for, his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to his son. And, on account of a like defect of hereditary blood, the issue of a denizen, born before denization, cannot inherit to him; but his issue, born after it, may. On the other hand the son of a naturalized subject, though born before the naturalization of the father, could always derive descent through the father, and inherit as though the father had been a natural-born subject.*

* 2 Stephens, Com. p. 427-9.

"Denization," it is said, "receives a man into the society as a

The extent to which the rights of a British subject were conferred on naturalization by Act of Parliament depended of course on the will of the legislature. In the earliest Acts the full rights of a natural-born subject were conferred; no qualification was necessary, nor were any conditions imposed. But when the Act of the 12 and 13 Wm. III. c. 2, the Act for settling the succession to the Crown, was passed, a jealousy of foreigners and of the followers who would be likely to accompany a foreign monarch to this country led to the insertion of a clause by which it was enacted "that no person born out of "these kingdoms (although he be naturalized or "made a denizen) except such as are born of English "parents, shall be capable to be of the Privy Council "or a member of either House of Parliament, or to "enjoy any office or place of trust, either civil or "military; or to have any grant of lands, tenements "or hereditaments from the Crown to himself, or any "other or others in trust for him."

In like manner, on the accession of the House of Hanover, a similar spirit of jealousy led to an enactment that no bill of naturalization should be received without a clause disabling the alien applying for it from being a member of the Privy Council, or a

new man, and makes him capable to purchase and transmit lands by descent, but not inheritable to any other relation; for though the King by his charter may admit him into the society, yet he cannot alter the law, which denied him to inherit any relations; but if he be naturalized by Act of Parliament, then he in all things inherits like a natural-born subject, because in an Act of Parliament every man's consent is included."—Bac. Abridgment, Tit. Alien (B).

member of either House of Parliament, or taking any office or place of trust either civil or military, or receiving a grant of Crown lands.*

To test the eligibility of the party seeking to be naturalized, the House of Lords, by a standing order of 1807, required a certificate from the Home Secretary respecting the applicant's previous conduct. This, however, was always granted on the recommendation of any person known to the Secretary of State.† At a subsequent period, it being found that persons became naturalized merely to claim the privileges of British subjects under treaties with foreign powers, without any intention of taking up their residence in Great Britain, an Act of the 14 Geo. III. c. 84 was passed, declaring that no bill of naturalization should be received which did not contain a proviso that the person naturalized should not be entitled to any such privileges or immunities, unless he had resided within British territory for seven years without having been absent for longer than two months.

The practice of applying to Parliament for Acts of naturalization has, however, been superseded by the operation of the Act of the 7 and 8 of her present Majesty, c. 66.‡ By this statute, on an alien presenting a memorial to one of Her Majesty's principal Secretaries of State, stating the grounds on which he

* 1 Geo. IV. stat. 2, c. 4. Under this Act it has been held that a naturalized subject is not eligible to the office of parish constable. R. v. Mierre, 5 Burr. 2788.

† Appendix to Report, p. 7.

‡ Since this statute applications for letters of denization have also become very rare; but the proceeding is still occasionally resorted to. Appendix to Report, p. 8.

desires to be naturalized, the Secretary of State, after inquiring into the circumstances of the case, is empowered, if he thinks fit, to issue a certificate, granting to the memorialist the rights and privileges of a British subject, except those of becoming a member of the Privy Council or of either House of Parliament, and subject to any other restriction which by the certificate he may think fit to impose. Upon obtaining this certificate and upon taking the oath prescribed by the statute, which is one of allegiance simply, the party thus naturalized becomes entitled to the rights of a British subject, save as excepted. He is not called upon to renounce his natural allegiance, nor is any inquiry made whether by the law of the foreign country such allegiance can be got rid of: in effect, as we shall see further on, the original allegiance is only placed in abeyance, and may, so far as this country is concerned, revive, while that due to the Crown of England will be lost, if the party naturalized should quit the dominions of the Crown.

The following regulations with reference to applications for naturalization were issued in 1847.

Home Office, Whitehall, August 1, 1847.

Regulations by the Secretary of State with reference to Certificates of Naturalization, in pursuance of Statute 7 *and* 8 *Vict. c.* 66, *intituled "An Act to amend the Laws relating to Aliens."*

I. Upon an application to the Secretary of State for the grant of a Certificate of Naturalization, it will be necessary that the applicant should present to one of Her Majesty's Principal Secretaries of State, a Memorial, praying for such grant, stating:

Of what Friendly State he is a Subject?

His Age, Profession, Trade, or other Occupation?

Whether he is Married, and has any Children?

Whether he has any settled place of Residence, and where situated, and how long he has resided within the Kingdom?

Whether he intends to continue to reside permanently within the United Kingdom?

On what grounds he seeks to obtain the Right and Capacities of a Natural born British subject.

II. That the memorialist should make a declaration before a Magistrate, or other person authorized to take such declaration, verifying the statements in his memorial.

III. That a declaration should be made and signed by four householders at least, who should state their places of residence, vouching for the respectability and loyalty of the memorialist, verifying also the several particulars stated in the memorial; and that this declaration should be made in due form, either together or separately, before a magistrate, or other person authorized by law to receive such declaration, in pursuance of the Act passed in the 5th and 6th years of His late Majesty King William IV.*

What effect the answers to the foregoing inquiries may have in influencing the decision of the Secretary of State, or what may be the considerations with reference to which naturalization is granted or withheld, is unknown: the matter is entirely in the discretion of the Secretary of State.

At first these certificates were given unconditionally; but much inconvenience having been experienced from persons applying for naturalization in order to secure British protection abroad for political and other purposes, advantage was taken of the power given to the Secretary of State, to add other exceptions. Since

* Appendix to Report, . 96.

1851, an exception has been inserted in the certificate of "any rights and capacities of a natural-born "British subject out of and beyond the dominions of "the British Crown, and the limits thereof."*

Since this regulation, the operation of the certificate of naturalization being by the express terms of the grant limited to the dominions of the Crown, out of the country the naturalized subject is no better than an alien†: so that, practically, the effect of naturalization is, not to confer British nationality, but only to give, in respect of political rights, the right of voting at parliamentary and municipal elections, and, in respect of civil rights, the capacity of an ordinary subject. The foregoing machinery seems cumbrous for so limited a result.

The effect of naturalization under the 7 & 8 Vic. c. 66 being prospective, children born abroad before the naturalization of the parent, though minors, still remain aliens; and its effect being confined to this country, children born abroad after the naturalization, if born when the father is out of this country, are aliens also.‡

Since 1858, the rights and capacities of a British subject are granted on the express condition that the party naturalized shall continue to reside permanently

* Appendix to Report, p. 9.

† As, by accepting British naturalization, the alien will generally by the law of his own country, have lost his nationality of origin, and when abroad is not a British subject, he will, when there, have no nationality at all, but will be a sort of "casual" without a settlement.

‡ See opinion of Law Officers, 1860. Appendix to Report, p. 9.

within the United Kingdom; and that if he shall at any time be voluntarily absent from it for a period of six months, without licence in writing from one of the Secretaries of State, the certificate shall be void, and all rights and capacities conferred by it shall absolutely cease and determine.*

It is to be observed, that while, under the English system, actual residence is necessary after the grant of naturalization, no prior residence whatever is now required in order to obtain it. It will be seen how materially the English practice differs in this respect from that of other countries.

The foregoing Act of 1844 having repealed the Acts of 12 & 13 Will. III. c. 2, 1 Geo. IV. c. 1, and 14 Geo. III. c. 84, there is now nothing to prevent an alien who desires to be naturalized in such a manner as to acquire, in addition to the ordinary civil rights of a British subject, the political rights excepted by the Act of 1844, and to be relieved from any conditions as to residence, from getting a Bill introduced into Parliament to effect that purpose. Such a Bill was introduced and passed into a law, in the recent case of M. Louis Bischoffsheim.†

* Appendix to Report, p. 9.

† Of course, except with the view of obtaining a seat in Parliament, or avoiding the restrictions imposed by the Statute, or by the certificate, no one would now adopt the more expensive process of getting an Act of naturalization passed, as the certificate may be had without difficulty, and at the small cost of 17*s* 6*d*. Prior to the Act of 1844, in the case of very eminent persons, the practice was to repeal the Statutes of 12 & 13 Wm. III. and 1 Geo. IV. c. 4, in the particular case. This was done on the naturalization of his R. H. the late Prince Consort, by 1 & 2 Vic. c. 3 & 4.

Besides these established means of conferring and acquiring naturalization, the character of British subjects has been from time to time exceptionally granted by different Acts of Parliament, with the view of promoting certain objects of supposed public interest. Thus by the 15 Charles II. c. 15, all foreigners who shall really and *bonâ fide* set up and use certain trades and manufactures (linen spinning, net weaving, tapestry making) by the space of three years in England, Wales, or Berwick-upon-Tweed, shall, on taking the usual oaths, enjoy all privileges whatsoever as the natural born subjects of the kingdom.

By the 13 Geo. II. c. 3, foreign seamen serving for two years on board English men-of-war or merchant ships, are naturalized *ipso facto*.

By the 13 Geo. II. c. 7, all foreigners who have resided seven years in any of Her Majesty's colonies in America, without having been absent more than two months at any one time, are to be naturalized on taking the oaths and making the declaration prescribed by the statute, and taking the sacrament.

By the 22 Geo. II. c. 45, foreign Protestants having served three years on any ship fitted out as therein mentioned, and employed in the whale fishery, are to be naturalized; but the privilege is lost if they go out of the King's dominions in England, Ireland, or the American plantations, for more than twelve months at a time.

The 2 Geo. III. c. 25 naturalized foreign Protestants serving two years in the Royal American Regiment or as Engineers in America.

The 26 Geo. III. c. 50 and the 28 Geo. III. c. 20

provide that every foreigner who has established himself and his family in Great Britain, and carried on the Southern Whale fishery, and imported the produce thereof for five years successively, shall be entitled to all the privileges of a natural born subject.

The naturalization conferred by all these statutes, except that of Charles II., was clogged with the restriction introduced by the 12 & 13 Wm. III. c. 2, and the 1 Geo. I. c. 4, that the persons so naturalized should be incapable of sitting in Parliament, or becoming members of the Privy Council, or receiving a grant of Crown lands.

Similar Acts, with corresponding restrictions, were passed by the Parliament of Ireland for the purpose of inducing foreign manufacturers to settle in Ireland. Later Acts introduced the condition of a prior residence in Ireland for three years, and of the party to be naturalized obtaining a licence from the Lord Lieutenant. It is said that these statutes are still in force with reference to persons so circumstanced, and that "a residence of three years in Ireland "and a licence from the Lord Lieutenant would "qualify any person, taking the oaths, to be ad- "mitted to all the privileges belonging to a British "born subject in the fullest sense of the word."*

It thus appears that this country has not scrupled to encourage the subjects of other nations to forsake their natural allegiance, and to settle in this country for the purposes of trade or manufacture, or to enter into our military or naval service. Yet the latter was one of our principal causes of complaint against the Americans in the early part of the present century.

* Opinion of Serjeant Stock, Appendix to Report, p. 7.

SECTION 3. *Naturalization in the Colonies.*

The effect of naturalization as a means of adding to the number of British Subjects is extended by the power which the local legislatures of our various colonies have to pass acts or ordinances for naturalizing aliens, or for authorizing their Governors to do so. This power is expressly recognized by the declaratory Act of the 10 & 11 Vic. c. 83. Each colony has its own law on this subject, and the conditions on which naturalization may be obtained vary exceedingly. In some, prior residence in the colony is essential, in others not. In the former the term of residence required varies from two years to seven. It would occupy too much space to give the particulars of these various laws. They will be found in the Appendix to the Report of the Commissioners.* Suffice it to say that they all require the party naturalized to take an oath of allegiance, whereby he takes on himself all the obligations and duties of a British subject; and all admit the party naturalized to the rights of a British subject, as though he had been born within the Colony.

It is, however, to be observed that the Act of 10 and 11 Vic. c. 83 appears to recognize the power of the Colonial legislatures to grant naturalization only within the limits of the respective Colonies. Accordingly in 1863, a circular was issued from the Foreign

* Page 10—12. The law of Natal makes it a condition of naturalization that the applicant shall be able to speak one or more of the languages of Europe, and *shall be able to write his name.* Ib. p. 11.

Office by Lord John Russell, to the effect that the rights conferred by Colonial naturalization must be taken to be limited to the precincts of the Colony. It appears however that in 1865 the opinion of the Law Officers of the Crown was taken on this subject, and that, according to their view, a foreigner duly naturalized in a British Colony is entitled, as a subject of the Queen in that Colony, to the protection of the British Government in every other State but that in which he was born and to which he owes a natural allegiance.* And this would seem to be the sounder view. Had Don Pacifico been naturalized at Gibraltar, instead of having been born there, he would not have been the less entitled to British protection.

Section 4. *Naturalization in the United States of America.*

In the United States of America, naturalization is acquired, under given conditions, by the mere act of a person desirous of becoming an American citizen, independently of any discretion, except as regards the character of the applicant, in the executive Government.

By an Act of April 14, 1802, any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions—1. He must declare on oath before one of the Courts specified in the Act, three years before his admission, his intention to become a citi-

* Appendix to Report, p. 96.

zen of the United States and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly by name to the prince, potentate, state, or sovereign whereof such alien may, at the time, be a citizen or subject. 2ndly. At the time of his application to be admitted, he must declare on oath, or affirmation, before one of such Courts, that he will support the Constitution of the United States, and that he absolutely and entirely renounces all allegiance and fidelity to every foreign prince, &c. and particularly, by name, to the prince, potentate, state, and sovereignty whereof he was before a citizen or subject; which proceedings are to be recorded.

3rd. The Court admitting the alien must be satisfied that he has resided five years within the United States, and one year within the state or territory where such Court is held; and that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same.

The 4th condition is that he shall renounce any title of nobility.*

By an Act of May 26, 1824, the interval between the declaration of intention and the application for admission is reduced from three years to two.† By an Act of March 26, 1802, the widow and children of an alien who has declared his intention to become

* Appendix to Report, p. 16.

† Appendix to Report, p. 17, and stat. at large v. ii. p. 809.

naturalized, may become citizens on taking the oath prescribed by law.*

It is admitted by the American authorities that the declaration of the intention to become an American citizen, has in itself no effect on the nationality of the individual; he remains an alien till final admission to citizenship.

The Army Act of 1862 contains the following, in these days somewhat remarkable clause, namely, that any alien of the age of twenty-one years, who has enlisted, or shall enlist, in either the regular or volunteer forces of the United States, and who has been, or shall be honourably discharged, may, upon proof of such discharge, and of good character, after one year's residence, be admitted a citizen of the United States, on his petition, without any previous declaration of intention.†

The children of a naturalized alien, if minors at the time of such naturalization, become citizens through the naturalization of the father: *a fortiori* children born after the father's naturalization.‡

Once admitted a citizen, the naturalized alien enjoys all the rights and privileges of a natural born American, save that, by the Constitution of 1787, no one can be eligible as a representative who has not been seven years, or as a senator who has not been nine years, a citizen of the United States, and that no one

* Appendix to Report, p. 17.

† Stat. at large, v. 12, p. 594. Appendix to Report, p. 17.

‡ United States Naturalization Act of 1802, § 4. Appendix to Report, p. 85.

but a natural born citizen is eligible for the office of President.*

It thus appears that the American law differs from the English law, 1, in requiring previous residence as a test of the sincerity of the desire of the alien to become a citizen; 2, in requiring a positive renunciation of his former allegiance. It agrees with the English law in disregarding the question whether the alien, by the law of his original country, can divest himself of his natural allegiance, and whether, on his undertaking to do so when prevented by such law, a conflict of duty and jurisdiction may not arise—more especially when the naturalization is conferred as an inducement to the alien to enter into the military service of the country of adoption.

Section 5. *Continental Naturalization.*

Let us next turn to the nations of continental Europe; and, firstly, to France. By the old law of France, naturalization was conferred on aliens, at the pleasure of the King, by letters under the great seal of the kingdom, called *lettres de naturalité*, whereby the King granted that the alien should be reputed a subject, and should enjoy all the rights, privileges, franchises and liberties of a natural born Frenchman, and should be capable of receiving all civil dignities. But to give effect to this naturalization, residence in France was essential. If the naturalized subject ceased to reside in the country, the character of a

* 1 Kent's Com. 293.

Frenchman was lost; and his children, if born out of the country, could not inherit from him.*

The law underwent several changes in the course of the French Revolution. The Constitution of 1793 went so far as to declare French citizens all aliens aged 21, who had been domiciled in France one year, and who lived by labour. The Constitution of 1795 superadded the condition that the alien should have previously declared his intention to domicile himself in France. The Constitution of 1801 was more stringent. It required a residence of ten years consecutively. But, by a decree of the Senate of 1804, passed originally for five years, but made perpetual by a decree of 17 Feb. 1808, the Government was authorized to confer French citizenship, after one year's residence, on any alien who had rendered important services to France, or brought into it useful talents, inventions, or manufactures, or who had formed any considerable establishment within it. But, on the restoration, a law of 1814 excluded all naturalized persons from the Chamber of Peers and the Chamber of Deputies, unless the letters of naturalization granted by the King were verified by the two Chambers. Thus naturalization was distinguished as *la grande naturalisation* and *la petite naturalisation*.†

This law has been greatly modified by subsequent legislation. By a law of 1849, the President of the Republic was to decide on applications for naturalization, after an inquiry into the character of

* Repertoire de Jurisprudence, Tome x. p. 481.

† Fœlix, Droit International, vol. i. p. 91.

the applicant and on the favourable report of the Council of State. But it was necessary that two conditions should precede the application. The alien must, after having attained the age of 21 years, have obtained authorisation to fix his domicile in France, conformably to the 13th Article of the Code Civil, and must have resided there ten years. This law expressly provided that the right of eligibility to the National Assembly could only be acquired by a special act of the legislature.*

Thus far the distinction between the greater and the lesser naturalization was maintained; but by a decree of 1852, all electors being 25 years of age are declared eligible to the Senate. Hence, as the lesser naturalization suffices to give a right of voting as an elector, Mons. Demangeat, in a note to his edition of Fælix, maintains that the difference between the two kinds of naturalization no longer exists, and that a foreigner naturalized by a simple decree of the Emperor now acquires the full political rights of a Frenchman. And he instances the case of Prince Poniatowski, who having been naturalized by an Imperial decree of October 1854 was raised to the dignity of a Senator by a subsequent decree of December of the same year.† Mons. Demolombe, than whom there can be no greater authority on French law, expresses himself to the same effect.‡

The law has been again remodelled by a statute of 1867, and it now stands thus. An alien, desirous

* Bulletin des Lois, vol. clxvii. p. 545.

† Fælix, Droit International—par Demangeat, vol. i. p. 92.

‡ Cours de Code Napoleon, vol. i. § 174, p. 220.

of being naturalized, must in the first instance apply for and obtain from the Minister of Justice authority to fix his domicile in France—which he can only do after having attained the age of 21. He must next have resided in France three years (instead of ten as required by the former law) from the time of being so authorized. But this term of three years may be reduced to one in favour of foreigners who have rendered important services to France, or who have introduced a manufacture or useful invention, or have brought with them distinguished talents, formed great establishments, or carried on agriculture on an extensive scale.*

The grant of naturalization is effected by a decree of the Emperor, founded on a report of the Minister of Justice, after an inquiry into the character of the alien, the Conseil d'État having first been heard.†

No condition is attached as to the alien having renounced his allegiance to his former country, or to his being in a position to transfer such allegiance to another.

The law of Belgium is substantially the same as that of France, but the difference between the "grande" and the "petite naturalisation" still subsists, and eligibility to the Chambers can only be acquired by special legislation.‡

Under the law of the kingdom of Italy, naturaliza-

* Residence in a foreign country in the service of France is put on the same footing as residence in France itself.

† Loi du 39 Juin, 1867. Appendix to Report, p. 24.

‡ Loi du 3 Mars, 1841, Articles 1 & 41. Appendix to Report, p. 27, 116.

tion may be granted to an alien by a special act of the legislature or by a decree of the king; but the latter is not effectual unless the alien thus naturalized fixes his domicile in the country.*

In Portugal, naturalization may be granted by the Executive Government. The law on this subject is, however, somewhat peculiar. While it requires residence for a year on Portuguese territory, as a condition precedent to naturalization, it makes an exception in favour of descendants of Portuguese blood who come to establish their domicile in the kingdom, dispensing with previous residence in their case, as also in that of an alien marrying a Portuguese woman, and of any one who has performed or may be called upon to perform any important service to the nation.†

Naturalization is freely conceded by the Austrian law. Not only may it be granted, on application, by the Government authorities, at their discretion, after inquiry into the antecedents and circumstances of the applicant, but it may also be acquired: 1, by any appointment to a civil office in the public service; 2, by the carrying on of any of the trades for which by the Austrian law it is necessary that the party shall be settled in Austria; and 3, by an uninterrupted residence in the country for 10 years.‡

* Codice Civile, Art. 10. Mazzoni Istituzioni di dritto Civile Italico, p. 134.

† Civil Code, Articles 19 and 20. Appendix to Report, p. 124.

‡ Allgemeines Bürgerliches Gesetzbuch, Arts. 29, 30; Ellinger, Handbuch, p. 35, 6.

In Prussia, the character and rights of Prussian subjects may be granted to aliens by the competent Police authorities, provided such aliens—1, are capable of receiving them in accordance with the laws of their former country; 2ndly, have led an irreproachable life; 3rdly, have settled in the country, and have a house or the means of subsistence in the place in which they have settled, and are in a position to maintain themselves and their families in that place. A permission to a foreigner to enter the service of the Prussian state supersedes the necessity of any deed of naturalization, and confers at once the character of a Prussian.

The grant of naturalization confers all the rights and imposes all the duties of a Prussian subject from the date of the grant.*

In Bavaria naturalization is acquired, 1st, by Royal decree, under the supervision of the Council of State; 2ndly, by domicile, on the party affording proof of having been liberated from personal allegiance to the country of his birth.†

In Holland, aliens acquire the rights of subjects when the following conditions have been complied with. First they must obtain permission from the King to establish their domicile in the kingdom. They must then establish it in some commune, and make the

* Law of December 31, 1842; Articles 5, 6, 7, 9. Appendix to Report, p. 146.

† Fœlix, vol. i. p. 99; Moy, Droit public de Bavière, vol. ii. s. 159.

Communal Administration acquainted with the fact. They must further retain their domicile in the same commune for six years; and lastly, must declare to the administration of the commune their intention to settle in the kingdom.*

To be naturalized in Russia, a foreigner must, in general, have been domiciled five years in the country. But before becoming domiciled, he must inform the Governor of the province in which he purposes to reside of his desire to do so, stating the nature of his occupation in his own country, and the pursuits he purposes to follow in Russia. In special cases, the period of domicile may be abridged: in the case of foreigners entering the Russian military or civil service, or of ecclesiastics of foreign persuasion, prior domicile is dispensed with altogether. After having been domiciled for the required period, the alien has to apply to the Minister of the Interior to be admitted to Russian allegiance, an application which it is in the discretion of the Minister to admit or refuse. If the application is granted, the alien is admitted to take an oath of allegiance, and thereupon becomes a Russian subject.

But the allegiance thus acquired is personal, and though it extends to children born after the naturalization, does not affect children born before it, though minors. Children born before the naturalization of their father, must themselves be admitted in the same way; unless, indeed, they are born and educated in

* Civile Code, Article 8; St. Joseph, Concordance, vol. ii. p. 349.

Russia, in which case, as we have already seen, they may be admitted as Russian subjects on application within a year after they come of age.*

In Sweden the King possesses the prerogative of adopting foreigners as Swedish subjects by act of naturalization. Good repute, means of self-support, and three years prior residence in the kingdom are necessary conditions; besides which, the applicant must attest before the proper authorities that he has ceased to be a subject of the foreign power to which he formerly belonged, or otherwise must resign in writing all the political privileges and rights he may possess in such foreign country; lastly, he must take the oath of allegiance to the King of Sweden. Naturalized aliens enjoy the same rights and privileges as natural-born Swedes, save that they cannot be appointed members of the Council of State.†

In Norway, not only may a foreigner be naturalized by the Storthing, but any one who has definitively fixed his domicile in the country, and resided there for ten years, thereby becomes entitled to all the rights, political and civil, of a Norwegian subject.‡

Denmark appears to be one of the few states in which naturalization cannot be effected otherwise than by a special Act of the legislature. Formerly, in order to enable an alien to carry on trade in the kingdom,

* Naturalization Law of 6th March, 1864. Appendix to Report, p. 26.

† Appendix to Report, p. 131.

‡ St. Joseph, Concordance, vol. iii. p. 4.

a grant of citizenship, called a Borger-bref, was required, to give effect to which it was necessary that the party should take an oath of allegiance. But the practice of granting Borger-brefs has been abolished, without, as it appears, any fresh power being vested in the Government to grant naturalization.

In the Ottoman Empire, by the law of the 19 Jan. 1869, already referred to, the character of a Turkish subject may be obtained on application to the Minister for Foreign Affairs, provided the applicant is of age and has resided five years consecutively within the Ottoman Empire—though the Government reserves to itself the power of dispensing with these conditions in exceptional cases.

As regards the children of a naturalized alien, children born after the naturalization become Ottoman subjects; all born before, though minors, remain aliens.

Prussia and Bavaria appear to be the only European States which pay regard to the important particular of the capacity of the party seeking to be naturalized to divest himself of his former allegiance.*

* In Sweden, (see preceding page), the party to be naturalized is required to prove that he has ceased to be a subject of his original country, but he is allowed the alternative of giving up all claim on such country. It does not follow that his original country gives up all claim on him.

CHAPTER III.

EXPATRIATION.

SECTION 1. *Expatriation in general.*

THE foregoing outline of the laws relating to naturalization will suffice to shew with what facility the subjects of one state may procure themselves to be accepted as the citizens of another,—in the great majority of instances without any inquiry as to their ability to transfer their allegiance from the country of origin to that of adoption. Yet it is obvious that, in the absence of this ability, the nationality of origin must remain, and with it the possibility of conflicting claims to the allegiance of the party naturalized, as well as of embarrassing claims to protection on his part. No doubt, if the position were universally adopted that, by becoming the subject of another State, a person naturalized effectually severed the political ties which bound him to his original country, and became free from all duty of allegiance to it, the matter would be extremely simple and no inconvenience could arise. But, unfortunately, there is no point on which the public law exhibits greater conflict than on this.

In some States the subject is left entirely free to expatriate himself if he pleases, and the mere fact of his becoming the naturalized subject of another country has the effect of dissolving the tie which bound him to the parent state. The advantage to

the individual of being a subject or citizen is looked upon as greater than that which the state derives from his allegiance, and he that quits his own country to become the subject of another is held to forfeit the nationality inherited from his fathers.

In a second class of States, while the right of expatriation and with it the dissolubility of the allegiance of origin is admitted, the consent of the Sovereign or State must be obtained before the individual can divest himself of the character and duties of a subject.

Lastly, there are States, in the law of which the maxim that a man cannot put off his country—*nemo potest exuere patriam*—prevails, and the subjects of which, therefore, if they become naturalized in another country, still remain subject to their original allegiance.

SECTION 2. *Foreign Law.*

By the old law of France, a Frenchman who had quitted his country, "sans aucun esprit de retour," was held to lose the quality and rights of a Frenchman. The "esprit de retour" was, indeed, always to be presumed, unless some fact appeared which clearly manifested the intention of expatriation. But naturalization in a foreign country was deemed to be such a fact.*

* Repertoire de Jurisprudence, Tit. Étranger, Vol. vii. p. 117. A royal ordinance of August, 1669, runs as follows: "Defendons a tous nos sujets de s'établir sans notre permission dans les pays étrangers, par mariage, acquisition d'immeubles, transports de leurs familles et biens, pour y prendre établissement stable et sans retour, à peine de confiscation de corps et biens, et d'être reputés étrangers."—*Ib.*

The expatriated subject could, however, if authorized by the King, return to France, and be readmitted to the status and rights of a subject on taking the oath of allegiance, but his restoration to the character of a Frenchman had no retroactive effect. Thus an inheritance, which, by reason of his incapacity during the period of his alienage, had devolved on another, was altogether lost to him. He could only benefit by rights accruing after the time of his readmission to the character of a Frenchman.*

These principles were adopted in the Code Napoleon; by the provisions of which the quality of a Frenchman is lost: 1. by naturalization in a foreign country; 2. by acceptance, unauthorized by the head of the State, of public functions conferred by a foreign government; 3. by any establishment in a foreign country sans esprit de retour. Commercial establishments are, however, never to be considered as having been made sans esprit de retour.†

Nevertheless, a Frenchman who has thus lost his French nationality, may recover it, on returning to France, with the authorization of the head of the State, and declaring that he intends to settle there, and that he renounces every distinction contrary to

* Repertoire de Jurisprudence, u. a.

† This must probably be taken to mean that an establishment for commercial purposes must not, *per se*, be considered as having been made sans esprit de retour. If it could be shewn, from other circumstances, that the Frenchman, though settling in the foreign country for the purpose of trade, had finally abandoned all intention of ever returning to his own country, the fact of his having settled for the purpose of trade, could hardly having the effect of exempting him from the operation of the general law.

the law of France. But the recovery of the character of Frenchman will only inure to the benefit of the party so restored in respect of rights accruing posterior to its date.*

The Frenchman who, without being authorized by the head of the State, takes military service under a foreign government, or attaches himself to a foreign military corporation, is in a worse position. He not only loses his quality as a Frenchman, but cannot return to France without authorization so to do; and if he desires to recover French nationality, can only do so by the same means as would be open to a foreigner, while, under any circumstances, if he has borne arms against France, he remains liable to the penalties pronounced by the penal law against Frenchmen who have so acted.†

It thus appears that the Code Napoleon throws no impediment in the way of a French subject becoming naturalized in a foreign country. If the subject is content to sacrifice his nationality as a Frenchman, the law leaves him free to follow his inclination; and, as the naturalization at once destroys the character of a French subject, even if he should afterwards bear arms against France, he would not, it is apprehended, under the Code, come within the provisions of the penal law which applies to Frenchmen alone.

But the provisions of the Code on this subject were

* Code Civil, Arts. 17—20.

† Code Civil, Art. 21. By the 75th Article of the Code penal, "Tout Français qui aura porté les armes contre la France sera "puni de mort."

materially modified by a decree of the Emperor Napoleon, of the 26th August, 1811. By this decree, the naturalization of a Frenchman in a foreign country, unless authorized by the Emperor, was forbidden. If such authorization had been obtained, the party, notwithstanding his naturalization in a foreign country, was to have the right of possessing and transmitting, and of inheriting property in France, even though the subjects of the country in which he might be naturalized did not possess such rights in France. The children of a Frenchman naturalized in a foreign country, and born there, were to be aliens, but they might recover the quality of Frenchmen on complying with the formalities prescribed by the 9th and 10th Articles of the Code; they were at all events to have the benefit of all rights accruing to them within the period of their majority, and ten years after it.

But Frenchmen thus naturalized were prohibited from bearing arms against France, under the penalty of the Article of the Penal Code already referred to.

The position of a Frenchman who became naturalized without authorization was far worse. His property was to be confiscated, and he was to be incapable of inheriting; any succession falling to him was to devolve on the next heir. If found on French territory, he was to be arrested, and conducted beyond the frontier; if taken a second time, he was to be condemned to imprisonment for not less than one year nor more than ten. If he bore arms against France, he was punishable with death.

It is admitted by French jurists that this decree had

originally the force of law: whether it is still in force is a matter on which there has been much diversity of opinion. By subsequent legislation, forfeiture of property as a punishment has been abolished, and foreigners have been made capable of inheriting in France; and it has been contended that by this legislation the decree of 1811 relative to Frenchmen naturalized without authority has been deprived of its force. The better opinion seems to be that, while the abolition of forfeiture would operate, so far as that is concerned, for the benefit of a party so circumstanced, the incapacity to succeed to an inheritance, being intended as a penalty on the Frenchman who deserts his country without permission, could not be affected by a law intended merely to improve the position of foreigners in general.* But, as is pointed out by Mons. Treitt, the Counsel to the English Embassy at Paris, in a very able letter to Lord Lyons of the 26th of January, 1868,† whether the decree of 1811 is in force or not, it does not in any way derogate from the enactment of the Code Napoleon, which gives to naturalization in a foreign country the effect of dissolving the tie between the subject and his country; it only attaches penalties to the act of the subject in accepting such naturalization. And the result therefore is that a French subject can at any time by his own act transfer his allegiance to any country which consents to naturalize him.

* The subject is discussed by Mons. Demolombe with the logic and learning which distinguish him. Cours de Code Napoleon, vol. i. p. 238-246.

† Appendix to Report, p. 21.

The States which have followed the Code Napoleon—Belgium, Greece, and the kingdom of Italy, are free from any such provision as is contained in the Imperial decree of 1811.

The new Italian Code varies, however, somewhat from the French. By section 11 of that Code, Citizenship is lost: 1. On renunciation by declaration before the proper civil authority of the province wherein the person resides, and subsequent emigration to a foreign State; 2. by naturalization in a foreign country; 3. by accepting employment from a foreign State without previous permission of the Italian Government, or by entering into the military service of a foreign Power.

The wife and minor children of one who has thus lost citizenship become aliens, unless they continue to reside within the realm. The wife, however, can re-acquire citizenship by returning, and declaring before the proper civil authority her intention to establish her domicile within the State; and the children may do so by a declaration similar to that required of the children of aliens born within the realm. Loss of citizenship in the cases stated does not exempt from the obligations of military service, or from the penalty inflicted on anyone who bears arms against his native country.

The citizen who has lost his citizenship for any of the reasons stated, will recover it: 1. By returning to the realm with the special permission of the Government; 2. by renunciation of the foreign citizenship, employment, or military service acquired in the foreign country; 3. by declaring be-

fore the proper civil authority of the State an intention to establish domicile within the realm, and by *bonâ fide* establishing it accordingly within a year.*

By the Spanish Constitution of 1845, the quality of a Spaniard is lost by naturalization in a foreign country, or by admission to the employ of a foreign country without the Royal license.† But by a Royal decree of the Spanish Government of 17th Nov. 1852, a Spaniard naturalized within the territory of another power without the knowledge and authority of his Government, shall not exempt himself from the obligations which were consequent on his primitive nationality,‡ though in other respects he may lose the quality of a Spaniard.

In Portugal, the quality of a natural subject is lost: 1. By naturalization in a foreign country; 2. by accepting, without permission of the King, an allowance or a decoration from a foreign Government; 3. by a sentence of banishment in cases in which the law attaches this consequence to the sentence.§

The right of Austrian subjects to expatriate themselves depends on authority first obtained from the Government. The law on this subject is settled by an Imperial ordinance of 1832,‖ which is very full and explicit, and enacts as follows:—

I. *Emigration or Expatriation.*—Any Austrian subject who

* Codice Civile, Art. 13.

† Art. 1. See Appendix to Report, p. 28.

‡ Appendix to Report, p. 59.

§ St. Joseph, Concordance, vol. iii. p. 139.

‖ Appendix to Report, p. 92.

leaves his own country for a foreign State without the intention of returning is to be considered as an emigrant.

II. *Lawful Emigration.* — Those who wish to emigrate must apply to the proper authority to be released from their Austrian citizenship. They must prove that they are self-dependent, and in the free exercise of their rights; they must state what members of their family are to emigrate with them; prove that they have all fulfilled their military liabilities; and show that no hindrances exist in regard to public duties. Should the application be rejected, recourse may be had to the Privy Council.

III. *Unauthorized Expatriation.*—Those who go to a foreign country without leave, with the expressed or apparent intention to return no more, are to be considered as unauthorized emigrants. Such intention is shown by the acceptance of foreign citizenship, or a foreign, civil, or military office without special permission; by joining a foreign religious institution or other association out of the Empire, requiring personal attendance; by staying abroad for five years without having property or business there requiring such absence, and if the family and property of the emigrant be withdrawn from the country; by staying abroad for ten years without the previous conditions; by non-obedience to a summons of recall to the Austrian States, issued by the Authorities. The five and ten years periods are not applicable to Austrian subjects residing in States with which Austria has Treaties of free emigration.

IV. *The Effects of Emigration.*—Those who emigrate with permission lose their character as Austrian subjects and are treated as foreigners. Those who emigrate without permission lose their rights of citizenship, and are liable to all the legal consequences of that loss; they lose the rank and advantages which they held in Austria, and are struck off the registers; they can neither acquire nor transfer property where this law applies; any previous testamentary disposi-

tions with regard to such property becomes void; their inheritances go to the next heir after them. Their property is sequestered without prejudice to the claims thereon. Their children or descendants resident in the State are suitably maintained out of the sequestered property. The net overplus goes to increase the property, the whole of which reverts to the heirs at the death of the expatriated owners. In special cases the Sovereign can allow the children to enjoy the sequestrated property.

V. *The Children of Unauthorized Emigrants.*—Those who are born before sentence has been passed against the father do not lose their Austrian citizenship or their position during their minority, nor for ten years after coming of age if the father be still living; nor for one year after his death, if within the ten years; nor for three years after coming of age if the father die before they do so; and they enter upon their full rights if they return to the Austrian States within those periods. This favour is also applicable to children sent to reside abroad by an Austrian subject living himself in the country. Such children are, however, to be looked upon as foreigners if they have acquired citizenship abroad, or if they do not claim the reserved rights within the prescribed periods.

VI. *Female Subjects married to Foreigners.*—These lose the Austrian citizenship on such marriage, and if they become widows, can only regain it in the same way as any female foreigner.

VII. *Re-habilitation.*—Citizenship can only be re-conferred on unauthorized emigrants by permission of the Sovereign; but those who have emigrated with permission may regain it in the manner prescribed in the General Code of Civil Law. Such regained citizenship is only available in regard to subsequently acquired rights.

The right of a Prussian subject to renounce his

natural allegiance and to emigrate to a foreign country cannot take place without a previous discharge by his own Government; but this discharge cannot be withheld, or the right to emigrate restricted, except with reference to the duty of military service.*

Such is the effect of a law of Dec. 31, 1842, concerning the loss of the quality of a Prussian subject. By this law the quality of a Prussian subject is lost: 1. by discharge upon the subject's request; 2. by sentence of a competent authority; 3. by living ten years in a foreign country.

The discharge has to be asked for from the police authority of the province in which the subject's domicile is situated, and is effected by a document made out by that authority.

It cannot be granted: (1.) To male subjects who are between seventeen and twenty-five years of age, until they have got a certificate of the military commission of recruitment of their district, proving that their application for discharge is not made merely to avoid the fulfilling of their military duty in the standing army; (2.) to actual soldiers, belonging either to the standing army or to the reserve; (3.) to officers of the militia or to public functionaries, prior to their being discharged from service; (4.) to subjects having formerly served as officers in the standing army or the militia, or having been appointed military employés with the rank of officers, or civil functionaries, before they have got the consent of their former chief; (5.) to the persons be-

* Art. 1 of Prussian Constitution of 1850; and see Appendix G. annexed to Report of Commissioners.

longing to the militia, not being officers, after their having been convoked for actual service. For other reasons than those specified, the discharge cannot be refused in time of peace.

The document of discharge effects, at the moment of its delivery, the loss of the quality of Prussian subject. If there is no special exception, the discharge comprehends also the wife and the minor children who are still under their father's authority.

Subjects living in a foreign country may lose their quality as Prussians by a declaration of the police authority of Prussia, if, having been summoned to return to the country within a fixed time, they fail to obey within the time.

Subjects who either leave the Prussian States without permission, and do not return within ten years, or leave with permission, but do not return within ten years after the expiration of the term granted by the permission, lose their quality as Prussian subjects.

Subjects who emigrate without having obtained their discharge, or who enter into the public service of a foreign State, without having obtained their discharge or the permission of the King to accept such service, are to be punished according to the laws existing in that respect.

In Bavaria, by an edict of May, 1818, annexed to the constitutional charter, the character of a subject is lost; 1. by acquiring citizenship in another country; 2. by actual emigration.*

In Wurtemberg, citizenship is lost, by emigration,

* Moy, Droit public de Bavière, vol. ii. § 159, Art. 6, Fœlix, vol. i, p. 99.

if authorized by the Government, or by employment by a foreign State.*

A Russian subject cannot emigrate or become naturalized in another country without the permission of the Emperor. If he does so, he commits an offence for which, under article 367 of the Penal Code, he will be deprived of all the rights of a Russian subject and banished for ever from the Russian dominions.† If having first obtained the necessary permission he becomes naturalized elsewhere, he loses his Russian nationality, but, the will of the Sovereign being all powerful, he might of course recover it on returning with the permission of the Emperor.‡

A naturalized foreigner is at liberty at any time to return to his former nationality, and on doing so may either quit the country or remain in it enjoying equal rights with other foreigners.§

By the law of Sweden, if a Swedish subject settles under the dominion of a foreign power, he is to be treated as a foreigner.‖ By a law of 1768, inserted in the law of succession in the Swedish Code,¶ he

* Weishaart Handbuch d. Wurtemberg. Privat-rechts 1. § 74. Fælix, vol. i. p. 99.

† See Appendix to Report, p. 59.

‡ This statement of the Russian law is made on information furnished by the courtesy of the Russian Authorities in this country. Instances of permission being given to a Russian subject to become naturalized elsewhere are extremely rare. The author was informed by His Excellency Baron Brunnow, that he had only known of one such instance in the whole of his experience.

§ Appendix to Report, p. 26.

‖ Penal Code of 1869, Chap. 1, § 2. ¶ Ibid. Chap. 18, § 7.

loses his right to any inheritance or succession. If he returns to the country he recovers his rights, but prospectively only. Whatever would have otherwise fallen to him in the interval goes to the next heir.

In Norway, nationality is lost by naturalization in a foreign country; by any establishment formed in a foreign country *sine animo revertendi;* by accepting, without permission from the King, any employment in a public capacity from a foreign government. But the Norwegian nationality may be recovered by returning to a Norwegian domicile, followed by a residence of ten years consecutively.*

A subject of the Ottoman Empire cannot divest himself of his character of Ottoman subject without the authority of the Imperial Government. If, having that authority, he becomes naturalized elsewhere, he is considered an alien. If he accepts a foreign naturalization without being authorized so to do, such naturalization is considered as of no effect, and he is still considered and dealt with in all respects as an Ottoman subject.†

SECTION 3. *Law of England and United States.*

At variance in this respect with the laws of all other civilized nations, the law of England, followed, as will presently be attempted to be shewn, by that of the United States, asserts, as an inflexible rule, that no British subject can put off his country or the natural allegiance which he owes to the Sovereign—

* St. Joseph Concordance, Tome iii. p. 4.

† Law of 19 January, 1869, Art. 5.

even with the assent of the Sovereign: in short, that natural allegiance cannot be got rid of by any thing less than an Act of the legislature, of which it is believed no instance has occurred.*

The state of the American law on this subject has been the subject of much discussion, and American jurists appear to be at issue with American statesmen in regard to it. Yet that the law of America was

* Calvin's Case, 7 Co. Rep. p. 1, 1 Blackst. Com. p. 66.

In the case of Æneas Macdonald, who was tried for high treason, for having borne arms in the rebellion of 1745, it appeared that the prisoner had been brought up from his early infancy in France, had in his riper years been employed in that country, and that he held a commission from the French king. After a faint attempt to make out that the prisoner had been born in France, his Counsel, despairing of establishing that fact, addressed the jury on the great hardship of such a prosecution against a person so circumstanced, and speaking of the doctrine of natural allegiance, represented it as a slavish principle, derogating from the principles of the revolution. But the Court interposed, and said it never was doubted that a subject-born, taking a commission from a foreign prince and committing high treason, may be punished as a subject for such treason, notwithstanding his foreign commission; that it was not in the power of any private person to shake off his allegiance and to transfer it to a foreign prince; nor was it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown. And the Lord Chief Justice Lee, in charging the jury, told them that, the overt acts laid in the indictment having been proved against the prisoner, and admitted by him, the only fact to be tried by them was whether he was a subject of Great Britain; as in that case he must be found guilty. The prisoner was accordingly found guilty, but received a pardon on condition of banishment.—*Æneas Macdonald's Case*, Foster's Crown Cases, p. 59.

originally the same as that of England cannot well be doubted, it being a settled principle of English Colonial law that Colonists on the first settlement of a Colony take with them the common and statute law of the mother country, so far as the same is capable of being applied to the circumstances of the colony. Hence, the law of the American Colonies having been the same as that of England immediately previous to the establishment of American independence, the law would so remain till altered by legislative enactment. But no such legislation has taken place. It has, however, been contended, in the opposite view, that the separation from Great Britain and the establishment of republican institutions had the effect of virtually abrogating a law founded on feudal principles; more especially as the doctrine of unalterable allegiance is incompatible with the natural freedom and the welfare of mankind, as well as with the interest of the United States, to the peopling of whose vast territories immigration is of essential and paramount importance. But, however cogent such considerations may be in showing what the law ought to be, it seems, on legal principles, impossible to say that a change from monarchical to republican government could carry with it the tacit abrogation of a law prohibiting expatriation and the putting off the allegiance due to the country of origin; nor can it be conceded that the public interest and convenience—still less that of individuals—suffice to alter a subsisting law without legislative action. Such is the view taken by Chancellor Kent, one of the greatest jurists whom

either this country or America has produced. After passing in review the authorities, Chancellor Kent thus proceeds: "From this historical review of the "principal discussions in the Federal Courts on this "interesting subject in American jurisprudence, the "better opinion would seem to be, that a citizen "cannot renounce his allegiance to the United States "without the permission of government, to be de- "clared by law; and that, as there is no existing "legislative regulation on the case, the rule of the "English common law remains unaltered."*

In like manner, another great jurist, Mr. Justice Story, in delivering the judgment of the Supreme Court

* 2 Kent's Com. p. 10. Chancellor Kent adds in a note, "This rule was admitted in Inglis *v.* The Trustees of the Sailors' Snug Harbour, 3 Peters' U. S. Rep. 99, and expressly declared in Shanks *v.* Dupont, Ibid. 242, where it was held, by the Supreme Court of the United States, that the marriage of a femme sole with an alien produced no dissolution of her native allegiance; and that it was the general doctrine that no person could, by any act of their own, without the consent of the government, put off their allegiance and become aliens. The Court of Appeals of Kentucky, in Alsberry *v.* Hawkins, 9 Dana's Rep. 178, so late as 1839, did indeed consider expatriation a practical and fundamental American doctrine, and that, if there be no statute regulation on the subject, a citizen may, in good faith, abjure his country, and that the assent of the government was to be presumed, and he be deemed denationalized. But from the cases already referred to, the weight of American authority is in favour of the opposite doctrine, which is founded, as I apprehend, upon the most safe and practicable principles. The naturalization laws of the United States are, however, inconsistent with this general doctrine, for they require the alien who is to be naturalized to abjure his former allegiance, without requiring any evidence that his native sovereign has released it."—

of the United States, says, "the general doctrine is that no person can, by any act of their own, without the consent of the Government, put off their allegiance and become aliens."* Quoting this judgment, Mr. Justice Sherman, another American judge, says, "I consider this the law of the United States."

The doctrine of allegiance and expatriation is elaborately discussed by Mr. Caleb Cushing, Attorney-General of the United States, in a report dated October 31, 1856; in which, after reviewing the cases bearing upon the subject which have come before the American Courts, and citing the opinions of the principal legal authorities of the United States, he thus sums up the result:

"Here the matter stands, unadjudicated as decision, but not undetermined as opinion. After carefully reviewing the whole subject, Chancellor Kent pronounces the better opinion to be, that a citizen cannot renounce his allegiance to the United States without permission of the Government to be declared by law. It is a significant fact, at all events, that, on so many occasions where the question presented itself, not one of the Judges of the Supreme Court has affirmed, while others have emphatically denied the unlimited right of expatriation from the United States."†

This admission should not be lost sight of when we come, further on, to see the reproaches addressed to this country by American statesmen on the existing state of our law of allegiance.

* Shanks *v.* Dupont, 3 Peters, U. S. Rep. p. 242. Appendix to Report, p. 49.

† Appendix to Report, p. 82.

CHAPTER IV.

DISPUTES ARISING FROM CONFLICTING CLAIMS.

SECTION 1. *Conflict of Laws.*

IT is obvious that from the conflict of laws which has thus been shewn to exist in respect of nationality of origin, very serious difficulty may arise, as to allegiance on the one hand, and the claim to protection on the other. The following case will illustrate the actual state of things. A man born of French parents within British territory is by the law of France a Frenchman: by the law of this country he is a British subject, and as such owes allegiance to the Sovereign of these realms. Let us suppose a child born of French parents during a temporary residence in this country. On the return of the parents to France, the child accompanies them, and is brought up as a Frenchman. Being subject to the conscription he becomes a soldier. Suppose that, war taking place between England and France, the man is made prisoner. He is liable to be condemned and punished as a traitor. Suppose, on the contrary, that, his parents having remained domiciled in this country, he is brought up as a British subject, and enters the British army or navy; he is liable, by the French law, to be put to death, for having, being a Frenchman, borne arms against France. The same state of things would arise, if a child, born of British

parents in France, were to claim under the 9th Article of the Code Civil, to be acknowledged as a Frenchman. He would none the less be a subject of the Queen; and if taken while serving under the conscription and bearing arms against this country, might find himself exposed to the inconvenient results already pointed out as possibly arising from a double allegiance.

But the difficulty is not confined to cases where there is a conflict of laws between two countries, by reason of the one making the relation of subject depend on the place of birth, the other on parentage. A conflict of jurisdiction may equally arise where the law of the two countries is identical, if, by the law of each, the relation of subject may be derived from both these sources. Thus, suppose a British subject to have children born to him in the United States. His offspring to the second generation will be British subjects by reason of their parentage, while they will equally be American citizens, as having been born within the territory of the States. The converse will of course equally hold of the children of American citizens born within the dominions of the British Crown.

A still more formidable source of embarrassment is to be found in the naturalization by one state of the subjects of another, when the latter refuses to relinquish its hold on their allegiance. This has been, for more than half a century a cause of discord between Great Britain and the United States.

SECTION 2. *Disputes between Great Britain and the United States.*

"The questions of naturalization and allegiance," say the Commissioners, "have been a fruitful "source of controversy between the two countries. "Commencing from the first establishment of the "American Union, they have continued with un- "abated vigour until the present day, when the great "increase in the number of persons settled in Ame- "rica has raised them to a position of the utmost im- "portance." *

The outbreak of the war between this country and France, after the French revolution, first gave a practical importance to the question. In those days impressment was habitually resorted to for manning the navy, while the severity of the discipline and the disregard of the comforts of the crews made our merchant seamen anxious to escape from the service. Hence considerable numbers enlisted in the American navy, or sought employment in American merchant vessels,† and frequently obtained the additional protection of American naturalization. The British Government, however, set at nought such claims to protection. Exercising its right to search the ships

* Appendix to Report, p. 30.

† The extent to which, owing to these causes, this practice had been carried, may be judged of by the fact that, from an Admiralty minute of the day, it appears there were supposed to be upwards of 20,000 British born seamen in the American marine. Impressment Papers, Feb. 21, 1812. Appendix to Report, p. 35.

of neutrals for contraband of war, it further proceeded to impress into the Royal Navy all natural born seamen who were found in American vessels, without paying any regard to their acquired American citizenship. From the year 1796 we find the government of the United States strongly remonstrating against this course of proceeding, and strenuously endeavouring to obtain by negotiation some concession from this country in respect of its pretensions on this subject. But the King's government remained inflexible, and asserted the prerogative of the Crown in the matter of allegiance and the right of impressment in the most unqualified manner. In November, 1806, Sir John Nicholl, then King's Advocate, advises the Government that "His "Majesty, by his Royal prerogative, has a right to re- "quire the service of all his seafaring subjects against "the enemy, and to seize them by force wherever they "shall be found. This right is limited by the terri- "torial sovereignty of other nations, and therefore "His Majesty cannot seize his subjects, because he "cannot exercise any act of force within the territory "of another State. But the high seas are extra- "territorial, and merchant vessels navigating upon "them are not admitted to possess a territorial juris- "diction, so as to protect British subjects from "the exercise of His Majesty's prerogative over "them. This right has from time immemorial "been asserted in practice, and acquiesced in by "foreign nations. The pretension appears to be "sound in principle, although difficulties may

"arise in its exercise, particularly on board vessels "of the United States, from the similarity of lan- "guage and appearance in British and American sea- "men." Sir John Nicholl adds, that if foreign merchants are aggrieved by it, they have only themselves to blame for engaging British seamen.*

In 1807, the terms of a treaty for reciprocal rights of commerce and navigation, regulations as to prize, privateering, blockade, and contraband of war, and trade with the enemies' colonies not blockaded, were agreed on between the Commissioners of the respective countries; but the British Government having stated on the subject of impressment that His Majesty could not give up the right of which complaint was made, the President refused to ratify the treaty, declaring that no treaty could be entered into with the British Government which did not include the subject of impressment.

In the November of 1807, in return for the celebrated Berlin decree of Napoleon, appeared the orders in Council declaring all French ports and ports in the possession of the French to be in a state of blockade; and with them a proclamation by the King, evidently directed against America, recalling all British seamen employed in foreign vessels. The following passages show the extent to which the authorities of this country were prepared to carry the doctrine of allegiance. "Whereas it has "been represented unto us that divers mariners and

* Appendix to Report, p. 32.

" seafaring men, our natural born subjects, have been " induced to accept letters of naturalization, or cer- " tificates of citizenship, from foreign states, and have " been taught to believe that, by such letters or " certificates, they are discharged from that duty of " allegiance which, as our natural-born subjects, " they owe to us: now we do hereby warn all such " mariners, seafaring men, and others, our natural- " born subjects, that no such letters of naturalization, " or certificates of citizenship, do, or can, in any " manner, divest our natural-born subjects of the " allegiance, or in any degree alter the duty which " they owe to us, their lawful Sovereign." After holding out a promise of free pardon to all such seamen as should immediately withdraw themselves from foreign service and return to their allegiance, it continues thus: " And we do declare that all such our " subjects who shall continue in the service of foreign " States, in disregard and contempt of this our Royal " Proclamation, will not only incur our just displea- " sure, but are liable to be proceeded against for such " contempt, and shall be proceeded against accord- " ingly."

The relations with the United States soon assumed a very unsatisfactory character. Acts of Congress were passed laying an embargo on vessels trading with Great Britain in ports of the United States, and interdicting commercial intercourse with England.*

* Appendix to Report, p. 34.

By the middle of 1812, the ill feeling between Great Britain and America, to which the question of impressment and nationality had so much contributed, but which other causes had also tended to aggravate, "culminated," to use an expression of the Commissioners, in a declaration of war by the United States. In answer to the proclamation of the President, a declaration of the Prince Regent, of the 9th of January, 1813, in dealing with the subject of impressment, so prominently put forward among the alleged grievances of America against this country, reasserted in the strongest terms the pretensions of the British Government.

"His Royal Highness can never admit that in the "exercise of the undoubted and hitherto undisputed "right of search of neutral merchant-vessels in time "of war, the impressment of British seamen when "found therein, can be deemed any violation of a "neutral flag. Neither can he admit that the taking "of such seamen from on board such vessels can be "considered by any neutral State as a hostile mea-"sure or a justifiable cause of war."

"There is no right more clearly established than "the right which a Sovereign has to the allegiance "of his subjects, more especially in time of war. "Their allegiance is no optional duty, which they "can decline and resume at pleasure. It is a call "which they are bound to obey: it began with "their birth, and can only terminate with their "existence."

" If, to the practice of the United States to har
" bour British seamen be added their assumed right
" to transfer the allegiance of British subjects, and
" thus to cancel the jurisdiction of their legitimate
" Sovereign, by acts of naturalization and certificates
" of citizenship, which they pretend to be as valid
" out of their own territory as within it, it is ob-
" vious that to abandon this ancient right of Great
" Britain, and to admit these novel pretensions of
" the United States, would be to expose to danger
" the very foundation of our maritime strength."

One of the ordinary incidents of war was followed by proceedings which soon tested the soundness of the principle asserted by Great Britain. Among the prisoners taken by the British forces were many who were natural-born subjects of Great Britain, but who had been naturalized or long domiciled in America. In September, 1812, six seamen were taken in the U. S. ship Nautilus, and sent to England, their exchange being refused, on the ground that they were British subjects. Two of them had been naturalized in America. Twelve British sailors, prisoners of war, were immediately detained as hostages by the American commander. The like course was adopted on six more American prisoners being sent from Nassau to England to be tried as traitors. On January 7, 1813, twenty-three soldiers of the American army, prisoners of war, some of whom had been naturalized, and all of whom had been domiciled in the United States, were sent to England for trial as traitors. A like number

of British prisoners, officers and men, were thereupon placed in strict confinement by the American government. Double that number of American officers and non-commissioned officers were forthwith ordered to be held as hostages for the safe keeping of the twenty-three British soldiers; and the American Commander-in-chief was apprized that "if any of the said British soldiers should suffer death by reason that the soldiers now under confinement had been found guilty, and that the known law, not only of Great Britain, but of every Independent State under similar circumstances, had been in consequence executed, it was ordered by the Prince Regent that there should be selected, out of the American officers and non-commissioned officers then in strict confinement, as many as would double the number of British soldiers who should have been so unwarrantably put to death, and that such officers and non-commissioned officers should suffer death immediately;" and further, that if the American Government persisted in the policy of retaliation, the war would be prosecuted with "unmitigated severity against all cities, towns, and villages belonging to the United States."*

The British Government appears, however, to have shrunk from the horrors of reciprocal and indefinite retaliation: none of the prisoners were dealt with as traitors; the sailors taken from the Nautilus and from the jail at Nassau were exchanged; and in a

* American State Papers, vol. iii. p. 632, and seq.; Appendix to Report, p. 35.

convention of the 16th of July 1814, for the exchange of prisoners, a stipulation was inserted for the exchange of the twenty-three British soldiers, and the forty-six American commissioned and non-commissioned officers, as prisoners of war.*

Nevertheless in the course of the same month we find the British government reiterating the doctrine of indelible allegiance, and threatening the penalties of high treason against those who remained in the service of the enemy, though naturalized. A proclamation by the Prince Regent, of the 24th of July, specially directed against America, after prohibiting all natural-born subjects of His Majesty from serving in the ships and armies of the United States, and charging all such persons at once to quit such service, proceeds as follows:

"And whereas it has been further represented to "us that divers of our natural born subjects as "aforesaid have been induced to accept letters of "Naturalization or Certificates of Citizenship from "the said United States of America, vainly supposing "that by such Letters or Certificates they are dis-"charged from that duty and allegiance which, as "our natural born subjects, they owe to us: Now we "do hereby warn all such our natural born subjects, "that no such Letters of Naturalization or Certificates "of Citizenship do, or can, in any manner discharge "our natural born subjects of the allegiance, or in any

* American State Papers, vol. iv. p. 738. Appendix to Report, p. 35.

"degree alter the duty which they owe to us, their "natural Sovereign:" A pardon is then offered to those who have so acted under error on immediately withdrawing from the service of the United States, and notice is given that any who shall persist in remaining in that service will subject themselves to be proceeded against with the utmost rigour; and, "Moreover, that all such our subjects, as aforesaid, "who have voluntarily entered, or shall enter, or "voluntarily continue to serve, on board of any such "ships of war, or in the land forces of the said United "States of America, at enmity with us, *are, and will* "*be guilty of high treason.*"

The pacification of Europe having, however, practically put an end to the grievance of search and impressment, which had given so much cause of offence to the United States, and neither party being disposed to continue the war for the sake of an abstract principle, negotiations for peace were opened at Ghent; and before the end of the year, peace between the two nations was restored—with this somewhat remarkable result, that, all chance of agreement between the two parties as to the right of impressment being hopeless, the treaty of peace was wholly silent as to that which had been the principal cause of the contest.

In 1818, while Mr. Rush was Minister of the United States in this country, negotiations were again opened for the settlement of this controversy, but without any result. After much discussion no

agreement could be come to as to any terms of settlement.

Thus matters rested till 1842, when other causes of difference between this country and the United States having arisen, Lord Ashburton was sent out on a special mission, to negotiate for the settlement of all existing differences between the two countries. Mr. Webster took advantage of this opportunity to revive the former controversy, and to urge the importance of coming to some definite understanding in respect of it. As the case from the American point of view has never been better put, the substance of this paper will be here stated.

"England," he says, "asserts the right of im-
"pressing British subjects in time of war, out of
"neutral merchant vessels, and of deciding by her
"visiting officers, who, among the crews of such
"merchant vessels, are British subjects. She asserts
"this as a legal exercise of the prerogative of the
"Crown, which prerogative is alleged to be founded
"on the English law of the perpetual and indissolu-
"ble allegiance of the subject, and his obligation
"under all circumstances, and for his whole life, to
"render military service to the Crown whenever
"required. The claim asserts an extra-territorial
"authority for the law of British prerogative; and
"assumes to exercise this extra-territorial authority
"to the manifest injury and annoyance of the citizens
"and subjects of other States on board their own
"vessels on the high seas.

"Every merchant vessel on the seas is right-
" fully considered as a part of the territory of the
" country to which it belongs. English soil, English
" territory, English jurisdiction, is the appropriate
" sphere for the operation of the English law. The
" ocean is the sphere of the law of nations, and by
" that law every merchant vessel on the seas is
" under the protection of the laws of her own na-
" tion."

He then argues that "if this notion of perpetual allegiance" were the law of the world, and were usually practised like the right of search for enemies' goods in time of war, it might be admissible, but that it was an English law, and could only be exercised of right within English jurisdiction.

He next refers to the great number of emigrants from Great Britain to the United States, "a greater " or less number of whom becoming in time natu-" ralized citizens, enter into the merchant service " under the flag of their adopted country;" and urges that nothing could be more unjust than for England to seek out these persons in time of war, and compel them to take arms for a country which has ceased to be their own country.

For these and other reasons, such as the great inconvenience to which neutral merchants were subjected by the practice, Mr. Webster declares, on behalf of the American Government, "that the " impressment of seamen from American vessels " cannot hereafter be allowed to take place. That

"practice is founded on principles which it does "not recognize, and is invariably attended by con- "sequences so unjust, so injurious, and of such "formidable magnitude, as cannot be submitted "to. . . . . In every regularly documented "American merchant vessel, the crew who navigate "it will find their protection in the flag which is "over them."

Lord Ashburton declined to enter upon the discusssion of this subject, alleging that his instructions were limited to existing subjects of difference, and that no differences had, or could have, arisen of late years with respect to impressment, because the practice had wholly ceased since the peace, and could not, consistently with existing laws and regulations for manning Her Majesty's Navy, be under present circumstances renewed.*

Hereupon the subject dropped, and did not further enter into the negociations which terminated in the Ashburton treaty. It was, however, revived on the occasion of the troubles in Ireland in the year 1848. Having reason to believe that a plot had been organized in America for the purpose of sending over men to assist the malcontents in Ireland, the Government issued an order, under the powers they then possessed, to arrest every American or returned emigrant landing in Ireland, which order was afterwards confined to the arrest of suspicious

* Parliamentary Papers relating to Lord Ashburton's Mission, p. 59. Appendix to Report, p. 39.

persons and the search of American baggage. A Mr. Bergen, a native American, and a Mr. Ryan, a naturalized Irishman, having been arrested under these orders, Mr. Bancroft, the American Minister at the English Court was instructed to interfere on their behalf. Mr. Bancroft having applied to the President for instructions as to the position of a naturalized citizen on his return to his native country for transient purposes, Mr. Buchanan replied that aliens were liable in the United States, as well as Great Britain, to trial for treasonable offences committed within the jurisdiction of the country; after which the despatch concludes:—"Whenever the occasion "may require it, you will resist the British doctrine "of perpetual allegiance, and maintain the American "principle, that British native born subjects, after "they have been naturalized under our laws, are, "to all intents and purposes, as much American "and entitled to the same degree of protection, as "though they had been born in the United States."

Mr. Bergen and Mr. Ryan were afterwards liberated on condition of leaving the kingdom, but Mr. Bancroft, by direction of the President, again addressed Lord Palmerston, remonstrating against any distinction being at any time made between naturalized and native Americans.* He argued that, by permitting emigration, England recognized the right of expatriation, and that to continue to claim the

* U. S. Congress Papers, Executive documents, 1859-60, vol. ii. p. 161.

allegiance of those who had left her shores and taken up their abode in a foreign country was to endeavour to plant alien colonies within that country, and to exercise the prerogative of royalty within a republic.

"It is quite time," he concludes, "that the two "nations should come to an understanding on this "subject. If the United Kingdom really wishes "to retain as subjects all the natives of this realm, let "the United Kingdom forbid the emigration of its "sons. But if their emigration is permitted, and even "stimulated, the land which accepts the anxious re- "sponsibility of receiving them must take full power "of regulating their political condition."

The answer of Lord Palmerston is interesting, as showing the views of this distinguished statesman on a matter of public moment—the position of emigrants who leave their own country to settle in a foreign one, and that of subjects who having become naturalized in another country afterwards return, whether for a temporary purpose, or otherwise, to their own. Lord Palmerston begins by stating that—

"He apprehends that the remonstrance contained in Mr. Bancroft's note has originated in a mistaken notion as to the doctrine held by Her Majesty's Government upon this matter; because Mr. Bancroft states that one consequence of the British doctrine of natural allegiance is, that Great Britain denies to the United States the right of regulating the condition of emigrants from Great Britain in such manner 'as may most conduce to the well-being of the emigrants and the safety of the [American] commonwealth.' Now,

although by the law of England natural allegiance is a tie which cannot be severed or altered by anything but the 'united concurrence of the legislature,' and although it is true (as observed by Mr. Justice Story, an eminent American authority), that 'every nation has hitherto assumed it as clear that its laws extend to and bind natural-born subjects at all times and in all places,' yet Her Majesty's Government did not dissent from the opinion of the same learned Judge, that 'in speaking of the right of a state to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them, and not of its right to compel or require obedience to such laws, on the part of other nations;' and Her Majesty's Government concur with Mr. Justice Story, in maintaining that '*every nation has an exclusive right to regulate persons and things within its own territory according to its own sovereign will and polity.*'

"The undersigned considers the above exposition of public law to be perfectly correct, and it appears to him to meet the objections to the doctrine of Her Majesty's Government which have been raised in Mr. Bancroft's note.

"With reference to these observations of Mr. Bancroft, from which it would appear that he assumes that Her Majesty's Government is disposed to doubt whether the poorer classes of emigrants who have come from Great Britain to the United States have a natural right to expatriate themselves, the undersigned begs to observe that it has never been denied by the British Government that those persons leave this country by virtue of that right, which is asserted by Mr. Bancroft to be the foundation of all liberty, namely, 'the right of every reasonable being to seek a new country;' and it is well known that by the laws of Great Britain no restraint can, except in very special cases, be placed upon the perfect liberty of every British subject to leave the realm,

when and for whatever period of time he chooses. It does not appear, however, that the passage quoted by Mr. Bancroft from Cicero* sanctions expatriation, in the sense of a voluntary abjuration of natural allegiance, without the assent of the Sovereign power; nor does an emigrant's departure from Great Britain debar him from returning thereto, at any subsequent time, as a natural-born subject. So long as the emigrant remains in the United States, or in any other country, he is amenable to the laws of the country in which he resides; and it cannot therefore be said as suggested in Mr. Bancroft's note, that the British Crown, by permitting its subjects to emigrate to the United States, is sending among the United States not only people to be provided for by sharing in the opportunities for industry, but 'subjects,' who may get arms and still serve Her Majesty, or that England is planting garrisons in all the territories of the Union.

"The undersigned has also to observe that Mr. Bancroft has referred generally to the orders issued in Ireland last year for the arrest of suspected persons, and has alluded to the distinction drawn by Her Majesty's Government between native and naturalized American citizens; and, although Mr. Bancroft's argument does not bear specifically upon that point, the undersigned begs leave to repeat what he has stated in his previous correspondence with Mr. Bancroft respecting this matter, namely: that natural-born subjects of Great Britain, who may have become naturalized in a foreign country, but who return to the United Kingdom, are as amenable as any other of Her Majesty's subjects to any laws which may be in force, either of a permanent or of a temporary nature: and the maxim, '*ignorantia legis non*

* "Jure enim nostro neque mutare civitatem quisquam invitus potest, neque, si velit, mutare non potest, modo asciscatur ab ea civitate, cujus esse se civitatis velit."—*Oratio pro Balbo.*

excusat,' must apply to them as well as to those who may be permanently resident within the United Kingdom."*

Thus the matter rested till the Fenian movement in Ireland gave occasion for its revival. No sooner had the Act for the suspension of the Habeas Corpus Act in Ireland passed in Feb. 1866, and arrests had taken place under it, than Mr. West, the acting American Consul at Dublin, was applied to for protection, on the score of American citizenship, by persons who had been, or were apprehensive of being, arrested. For the most part the applicants were native Irishmen, who had become naturalized in the United States. The instructions given by Mr. Adams, the Minister of the United States, to Mr. West, were "to secure a proper share of protection for innocent persons, who were citizens of the United States, without attempting to interfere on behalf of those who had justly subjected themselves to suspicion of complicity with treasonable practices."

Mr. Adams was much too clear-sighted and just-minded not to see how the case really stood, and that the persons arrested and now claiming protection as American subjects were, in truth, if not the instigators, at all events, the active promoters of an organized conspiracy to raise a rebellion in Ireland with a view to overthrow the government. In reporting to Mr. Seward the passing of the Act of Feb. 7th, 1866, he says, "There is some reason to "believe that many of these people now under ar-

* Appendix to Report, p. 41.

"rest are really more or less implicated in the or-
"ganization. . . They are also astute enough to
"be capable of contriving means of raising a com-
"plication between the two nations, out of the
"questions that may follow from any abuse of the
"extraordinary means of repression now resorted to
"here."

It is due to Mr. Seward to say that he, too, viewed the matter in the same just and equitable light. In a despatch to Mr. Adams of the 10th of March, he says, "It may be expected that some of our Irish-born "naturalized citizens who are now sojourning or "travelling in Ireland will be arrested. . . . . "Americans, whether native-born or naturalized, owe "submission to the same laws in Great Britain as "British subjects, while residing there and enjoying "the protection of that Government. We applied "the converse of this principle to British subjects "who were sojourning or travelling in the United "States during the late rebellion."*

At an interview with Lord Clarendon on the 15th of March, Mr. Adams declared that, even in the admitted cases of naturalization, if the Government had in its hands the proofs of complicity with treasonable designs, he should feel obliged, on being informed of them, to desist from further interference, and that his appeals to the Government "would be "confined to those cases in which there was mere

* Papers relating to Foreign Affairs, part 1, p. 1-204. Appendix to Report, p. 47-48.

"suspicion, or at most feeble evidence of actual evil "and intent."*

The conduct of these two distinguished American statesmen is the more worthy of note by reason of the very different spirit afterwards manifested in Congress, when the proceedings relating to the Fenian arrests came under discussion in that assembly.

To continue the narrative. It appears that on application being made to the British Government in favour of naturalized Irishmen who had been arrested, the old doctrine of allegiance was asserted, and the admissibility of the intervention of the representative of the United States, in theory at least, denied. In a letter of the 2nd of March, speaking with reference to the arrested persons on whose behalf applications had been made, Mr. Adams writes:

"I have received from Mr. West a letter, inclosing the final answer of the authorities in regard to naturalized citizens, which goes the whole length of claiming the allegiance."

And in another letter of March 8th—

"It is thus far made clear that the Government claims the right of dealing as it pleases with native Irishmen, no regard whatever being paid to the fact of their naturalization in the United States."

It appears, however, that, as matter of comity, applications of Mr. Adams in favour of individuals thus circumstanced were attended to, and the parties

* Papers relating to Foreign Affairs, part 1, p. 83. Appendix to Report, p. 48.

released. At an interview on the 29th of May, Lord Clarendon informed Mr. Adams that instructions had been given to remove all unnecessary distinctions between United States' native and naturalized prisoners, though of course the point of allegiance could not be conceded, and that the Government were desirous to get rid of those who had been imprisoned as quickly as they could consistently with the public safety. On the 9th of June, Mr. Seward instructed Mr. Adams "to suggest to Lord Clarendon the expediency of the extension of clemency "to the extent at least of releasing all the American "citizens, native or naturalized, then in confinement, "upon the condition of their returning to the United "States." On the 2nd of August, Mr. Adams reported that releases were being steadily granted, and that of those who had been arrested, there was little doubt in his own mind that nearly all were more or less privy to the "Fenian organization, and came out to further its designs." On the 23rd of August, he reported that no person proved to be a native or a naturalized citizen of the United States then remained in Dublin under the Act for suspending the *habeas corpus:* and on the 29th of September, 1866, that there was then no case before the Legation of a proved American citizen being in custody in Ireland on suspicion of being concerned in treasonable practices there. With this state of things the correspondence naturally dropped.*

* Papers relating to Foreign Affairs, part 1, p. 95-204. Appendix to Report, p. 48.

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[redacted] of Congress is respectfully called to a
[redacted] rassing conflict of laws. The Executive
[redacted] Government has hitherto uniformly held,
[redacted] that naturalization in conformity with the
[redacted] laws of the United States absolves the recipi-
[redacted] its native allegiance. The Courts of Great
[redacted] that allegiance to the British Crown is indefeasible
[redacted] is not absolved by our laws of naturalization. Judges cite courts and law authorities of the United Kingdom in support of that theory against the position held by the executive authority of the United States. This conflict of opinion distresses the public mind concerning the rights of naturalized citizens, and impairs the national authority abroad. I have already called attention to this subject in my last annual message, and must now again respectfully apply to Congress to declare the national will unmistakeably upon this important question."

The matter was, however, entered on by Congress, not with a view to the settlement of their own law, but

In October, 1867, the effect of American naturalization as affecting the allegiance of a natural-born subject came formally before a Court of Law. On the trial of Warren, before Chief Baron Pigott and Mr. Justice Keogh, at Dublin, on the 30th of October, 1867, on a charge of treason felony, a jury *de medietate linguæ*, as it is technically termed, in other words a mixed jury, consisting half of subjects and half of foreigners, having been applied for, on the ground that Warren, though born in Ireland, was an American, having been naturalized in America, the application was refused, the Court ruling that "according to the law of England, a law which has "been administered without variation or doubt from "the earliest times—he who once is under the alle-"giance of the English Sovereign remains so for "ever." On the trial of Costello, which took place shortly afterwards, a similar application was refused by Mr. Justice Keogh on the same ground.

It was impossible that, administering the law as it now stands, those learned Judges could take any other course or sanction any other doctrine. And,—whatever may be the language held by American politicians—it may be asserted with perfect confidence—looking to the high estimation for inflexible uprightness and conscientiousness in which American judges are justly held—that had a like case occurred in the United States, and a native American naturalized in England had, when put on his trial for an offence committed in America, made a similar application, no American judge, as the law of the United

States now stands, would have ruled differently as to the law or acceded to such an application.

It is difficult to see how in the events which have been stated the public mind in America could find cause of umbrage or resentment. Nevertheless no sooner did Congress meet, in the autumn of 1867, than the proceedings in Ireland were taken up in an angry and hostile spirit. The President in his Message had called the attention of Congress to the subject of the law of allegiance, and to the discrepancy between the views of American statesmen and American jurists in respect of it, with the object of having the law settled, in the following temperate and statesmanlike language:—

"The attention of Congress is respectfully called to a singular and embarrassing conflict of laws. The Executive Department of this Government has hitherto uniformly held, as it now holds, that naturalization in conformity with the constitution and laws of the United States absolves the recipient from his native allegiance. The Courts of Great Britain hold that allegiance to the British Crown is indefeasible, and is not absolved by our laws of naturalization. British judges cite courts and law authorities of the United States in support of that theory against the position held by the Executive authority of the United States. This conflict perplexes the public mind concerning the rights of naturalized citizens, and impairs the national authority abroad. I called attention to this subject in my last annual message, and now again respectfully apply to Congress to declare the national will unmistakeably upon this important question."

The matter was, however, entered on by Congress, not with a view to the settlement of their own law, but

with a view to assail the conduct of the Government of Great Britain in the arrest of American citizens. On the 25th of November, Mr. Robinson, a naturalized Irishman, member for New York, moved a resolution in the House of Representatives, that the Committee for Foreign Affairs should be instructed to inquire into Mr. Adams's conduct with regard to the protection of naturalized citizens in Great Britain; that Mr. Adams should be recalled; and that all correspondence for the last two years between the English and American Governments should be at once submitted to the House.*

Passing by the angry and menacing speeches made on the different occasions when this subject was before Congress, the resolutions moved by different members will sufficiently show the grounds of complaint and the temper in which the subject was approached. Mr. Robinson insisted on three points; 1, that "no American citizen travelling in Great "Britain or elsewhere, on business or pleasure, should "be imprisoned without proper charges or sworn "information being made against him, and upon "these charges or information, even under the suspen- "sion of *habeas corpus*, a fair and speedy trial should "be secured to him; 2, that no American thus tra- "velling should be ordered to quit the country where "he may be, or be escorted to ships going thence, or "be placed in any position compelling or inducing "him to accept that degrading alternative; 3, that "the benefit of English law should be fully accorded "to all American citizens, whether native or adopted,

* Appendix to Report, p. 49.

"the same as to aliens or strangers from other "countries."

On the 2nd December, Mr. Robinson also moved an adverse resolution against Mr. West, the United States Consul at Dublin. On the 19th of December resolutions were presented in the House of Representatives by Mr. Eggerton, of Ohio, protesting against the treatment of adopted American citizens by foreign nations. On the 20th of December, Mr. Price, of Iowa, presented a petition from I. W. Nagle, a native American, imprisoned on account of the so-called Jacmel landing, and moved a resolution "that "the representatives of the people of the United "States do hereby declare it to be our determination "to submit to no such oppression of our citizens by "any power, and that we will, with as little delay "as possible, adopt such measures as will make it "safe for an American citizen free from crimes to "travel in any part of the world." On the 9th of January two resolutions were passed unanimously in the House of Representatives, one requesting the President to intercede with the Queen of England for the release of the Canadian prisoners, McMahon and Lynch; and the other requesting the President "to intercede with a view of obtaining the release of Warren and Nagle, and any other American citizens who have been arrested in Ireland or elsewhere, and who are now imprisoned without sufficient grounds to charge them with the commission of any offence against the laws of Great Britain."*

* Appendix to Report, p. 50.

All these resolutions were referred successively to the Committee of the House of Representatives on Foreign Affairs, to be by them considered and reported upon. On the 27th of January, the Committee presented their report. It is to be regretted that a document, admirable in many parts in respect of research and reasoning, should have been made the vehicle of unfriendly, and certainly, so far as the Fenian arrests are concerned, unjust reproach against this country. After referring to the question of the right of expatriation as one of the most important questions of the day, the introductory part of the report proceeds :—

"At the commencement of the war of 1812, the number of emigrants in the United States did not exceed 120,000. International difficulties prevented any considerable emigration from 1810 to 1816. The actual returns from 1820 to 1867, added to the estimated emigration from 1790 to 1820, show that the total emigration to this country from Europe since the Declaration of Independence is 6,640,000 persons. No more important question can arise than that which concerns the relations of this portion of the American people to the governments they have abandoned and that of their adoption. The English law holds them and their descendants as British subjects, 'at least to the second generation, 'and perhaps for ever.'* The theory of a double allegiance is discarded, and they and their descendants, even though

* This statement is founded on the following passage in Westlake's Private International Law, p. 23, "Unless the British Government consents to their ancestor's expatriation, the same posterity must be treated as British at least to the second generation, and *perhaps for ever.*" There is no foundation whatever for such a notion as is expressed in the concluding words.

born of a foreign mother, are inexorably and for ever held to the service of native born subjects, incapable of disavowing their allegiance to the mother country or of acquiring a legal citizenship in another land, and liable to punishment as traitors if found in a time of war in the army or navy of their adopted country.

"During a general war in Europe they would be deprived of the privileges of travel or commerce; and in the event of participation by this Government in such war, which is not impossible, they would be liable to punishment as traitors by European or American governments, whether yielding compulsory service to one or the other. The execution of naturalized citizens of the United States when captured in the American army by the British troops, who claimed them as British subjects during the late war, was only prevented by the President's orders for retaliation on British soldiers. *Deprived of recognized citizenship, debarred from the privileges of travel or commerce in peace, and exposed to punishment in time of war, they are without safety and without rights.* The commission of public crimes could not more effectually strip them of privileges which in every age and in all parts of the world have been the accompaniments of civilization and freedom. At the opening of our national career, Great Britain attempted to enforce her claims upon her natural-born subjects beyond her territorial jurisdiction, arresting American ships and impressing American seamen under their own flag. The actual sufferers were few in number. Now, after the lapse of half a century, a similar claim is enforced against a nation of people; not, it is true, as before, upon their own soil or under their own flag, but wherever found within the jurisdiction of other nations. In the first contest their success would have driven American sailors from the ocean. In this it would deprive masses of the American people of privileges that were never denied to any nation, retaining any sense of the value of personal liberty.

It is scarcely to be supposed that it can be pressed to this extent; but if the doctrine be inapplicable to masses of people it is unjust that it should be enforced against individual citizens in a manner to disturb the peace of a nation.

"The correspondence transmitted to Congress shows that naturalized citizens of the United States, being present in Great Britain, *without the commission of any offence, have been arrested, tried, convicted, sentenced, and punished as criminals, upon the ground that they were natural-born subjects of the Crown;* that their allegiance was perpetual and indefeasible, except by its consent; and that they were therefore subject to its laws and liable to punishment not only for offences committed within its jurisdiction, but for words and acts performed in the United States. They claim the protection of their adopted country which has made them citizens and conferred upon them the same rights both at home and abroad which are enjoyed by native born Americans. The Government is in duty bound to listen to their appeal, and to protect them in their rights."

Looking to the language used in the House of Representatives, to the resolutions proposed there, and to the terms of this report, a person unacquainted with the facts would be led to imagine that some law existed in this country, especially directed against naturalized citizens of the United States, whereby such citizens, innocently travelling on business or pleasure, and unoffending against the law, had been causelessly deprived of liberty and exposed to ignominy and wrong, and tried and convicted of offences against the law without proof of guilt. In the face of the true facts, impartially and dispassionately viewed, these accusations fall harmless to the ground. But since such extraordinary charges have

been made, a simple statement of the facts may not be without its use.

A rebellious spirit having manifested itself in parts of Ireland, and serious disturbance of the public peace being anticipated, it became necessary, in the opinion of Parliament and of the country, at the commencement of 1866, to strengthen the hands of the Executive, by passing an Act for suspending the Habeas Corpus Act in Ireland. It being perfectly well known to the authorities, and indeed notorious to the world, that an organized plot had been formed for bringing about insurrection and rebellion in Ireland, with a view to overthrow the Government in that country, it became the duty of the Executive to exercise their power of arresting persons suspected of designs against the public peace. It is for this purpose that, in circumstances of impending danger, the liberty of the subject, from a sense of imperious necessity, *ne quid detrimenti respublica capiat*, is deprived of its ordinary safeguards. Now, it so happened that the prime movers in the seditious and treasonable conspiracy going on in Ireland were Irishmen, who had left their native country and had become naturalized in the United States. Whether the movement had originated in America or in Ireland it is not worth while now to inquire. The facts which came out on the Fenian trials, abundantly proved—and the fact is too notorious ever to have been denied—that these men, who, having formally renounced their allegiance to their native country, had, in the American point of view, dissolved the ties which originally bound

them to the country of their birth, and consequently had no longer any concern in her affairs, were, if not the original contrivers of this flagitious enterprise for kindling civil war in Ireland, at all events, the principal agents in the conspiracy, and the intended leaders, if they could find men deluded enough to follow them, of an armed insurrectionary movement, which, if successful, must plunge Ireland into anarchy and confusion, and which, even if certain to be unsuccessful, must still, unless crushed in its commencement, entail consequences of the most lamentable character.

It cannot, assuredly, be contended that the authorities were to hold their hands, and not deprive these men of the means of doing mischief, by the exercise of the powers which Parliament had placed at their disposal, simply because these quondam subjects had secured the protection of American naturalization. It is a fallacy to put the matter as turning on the question of continuing allegiance at all. Had the parties arrested been natural born Americans, instead of Americanized Irishmen (if this expression may be permitted), they would, if falling under a reasonable suspicion of complicity in a traitorous conspiracy, have been liable to be arrested; and the Government, in the discharge of its duty, as guardian of the public safety, would have been bound to cause them to be apprehended. No proposition of international law can be more firmly settled—and in this American jurists and statesmen fully concur—than that the subjects of one country,

when within the territories of another, owe obedience to the law of the latter, and are as amenable to its dispositions as the subjects of the State themselves.

When, in 1862, the President took upon himself to suspend the Habeas Corpus Act without the sanction of Congress, and Lord Lyons was instructed to remonstrate on the arbitrary arrests of British subjects, Mr. Seward, in answer, denied the right of Her Majesty's Government to protest, asserting that in every case subjects of Her Majesty, residing in the United States, and under their protection, were treated, during the then troubles, in the same manner and with no greater or less rigour than American citizens.*

American citizens, therefore, whether natural born or naturalized, who came to Ireland to levy war against and overthrow the existing government, were amenable to the penalties of our treason law, or, if falling under a reasonable suspicion of meditating such conduct, were as much subject to the repressive measures placed at the disposal of the Government, as the subjects of the Queen. If, indeed, the authorities in Ireland had abused their power, and, for purposes of oppression, had availed themselves of the opportunity to seize American citizens, without reasonable cause to suspect them of hostile designs, and without an honest belief in their guilt, America would most assuredly have had good cause to complain. But nothing of the kind can with the smallest show of reason be alleged. That mistakes may have

* Appendix to Report, p. 42.

occurred is no doubt possible. But allowance must be made for the difficulties in which the Government of Ireland was placed. It was known that an organized conspiracy had been formed for raising a rebellion in Ireland. It was known that the leaders were to be looked for from America. Suddenly a swarm of strangers of American aspect present themselves, without apparent business or purpose in the island. Many of them are ascertained to be native Irish, who had emigrated to the United States. The authorities are led, not without good reason, to believe that these suspicious strangers are mixed up with the Fenian conspiracy, and the suspected persons are arrested, as a measure deemed absolutely necessary for the public safety and protection. It is possible that in some few instances the suspicion was unfounded; in some it may not have been without foundation, but the proofs may have failed. Whenever, on fuller inquiry, the authorities were satisfied that such was the case, the prisoners were released. Several instances are cited in the Appendix to the Report of the Commissioners,* in which, on the intervention of Mr. Adams, persons who had been arrested were released. In some of these, the Government, not being without apprehension of danger from their being at large, but not wishing longer to detain them, stipulated that they should leave the country; and this measure, obviously intended as one of self protection, is treated as an indignity offered to American citizens.

* p. 48.

It must be obvious to every unprejudiced mind that, as it was the duty of the Irish Government to avail itself of its powers, in order to suppress a dangerous conspiracy, against subject and stranger indiscriminately, and as it is unquestionable that the stranger is as much subject to our law as the native, the only question that can be raised with reference to these transactions is whether the Government honestly exercised its powers with a view to its own protection and the preservation of the public safety, or abused them for the purpose of vexatiously oppressing American citizens.

And here it must not be forgotten that Mr. Adams, whose business it was to watch over the interests of American citizens, expressly declared, in his despatch to Mr. Seward already referred to, that there was little doubt in his own mind that of the persons who had been arrested down to August, 1866, nearly all were more or less privy to the Fenian organization, and came out to further its designs; and that Mr. Seward, far from questioning the good faith of the British Government, or complaining of its conduct in the matter of these arrests, or considering the liberation of the parties imprisoned on condition of their returning to the United States as an indignity or "degradation of American citizens," directed Mr. Adams to ask this of Lord Clarendon as an exercise of "clemency."

It may be that this country has maintained too long its ancient rule on the subject of allegiance; that this rule is no longer suited to the age in which

we live, and that the desire of the United States in this respect should be met in a spirit of comity and conciliation. But what reasonable man can contend that the Fenian conspiracy was an occasion on which to change the established law? Was a fundamental and undoubted law, existing from the earliest period of our history, to be abrogated for the benefit of conspirators and rebels—of recreant subjects, who having abandoned, or affected to abandon, the country of their birth, came back to it to plunge it into all the horrors of civil war, intending no doubt if their guilty enterprize should succeed, and carry them into power, to abide in it, with the alternative, in case of failure, of seeking to escape under the plea of American citizenship?

When in the face of these facts, the conduct of the Government in arresting Fenian conspirators, or persons honestly believed to be such, is represented in Congress as showing the necessity for insisting against this country that "no American citizen travelling in Great Britain on *business or pleasure*, shall be imprisoned without proper charges or sworn information;" that "no American citizen so travelling shall be ordered to quit the country or be placed in a position to compel him to accept the degrading alternative;" and that "the benefit of English law shall be accorded to American citizens as to aliens of other countries"—as if there was the slightest shadow of pretence for saying that any such distinction as that suggested had ever been made—and when, in the report of a Committee of the House of

Representatives, we find British subjects naturalized in the United States described, when in this country, as "*deprived of recognized citizenship, debarred from* "*the privileges of travel or commerce in peace, and ex-* "*posed to punishment in time of war, and without* "*safety and without rights;*" and when, again, in the same report, we are told that "naturalized citizens "of the United States, being present in Great Britain, "WITHOUT THE COMMISSION OF ANY OFFENCE, *have* "*been arrested, tried, convicted, sentenced, and punished* "*as criminals, upon the ground that they were the* "*natural born subjects of the Crown,*"—it is impossible to say whether astonishment or regret predominate at finding so unjust, ungenerous, and perverted a view taken of the conduct of Great Britain, at a most critical and trying conjuncture, when seeking only the legitimate object of self-protection, without the remotest thought of doing wrong to American citizens as such, or of giving offence to the American people.

It only remains to be added, to complete this part of the case, that upon the report of the Committee on Foreign Affairs, a bill was introduced, entitled a bill concerning the rights of American citizens in foreign States, by which it was proposed to enact, first, that:—

"All naturalized citizens of the United States while in foreign States should be entitled to and receive from the Government the same protection of persons and property that is accorded to native born citizens in like situation and circumstances."

Secondly, "that whenever any naturalized citizen of the United States should be arrested and detained by any foreign Government, upon the allegation that naturalization in the United States does not operate to dissolve his allegiance to his native Sovereign, or if the release of any citizen so arrested and detained should be unreasonably delayed or refused, the President should be empowered to order the arrest and to detain in custody any subject or citizen of such foreign Government who may be found within the jurisdiction of the United States."

The debate which ensued on this bill is not a little remarkable, from the circumstance that several members who took part in it challenged attention to the fact that, while the promoters of the measure were aiming their attacks against Great Britain on account of its law relating to allegiance, the American law, the same originally beyond doubt as ours, still remained unaltered. Thus Mr. Wilson, of Iowa, gave notice that he should move to strike out the second clause, because "the Government of the United States has never insisted upon and maintained the doctrine of the right of expatriation"; and Mr. Woodward proposed to insert a clause providing for the expatriation of Americans becoming domiciled abroad, on the ground that "when we are asking foreign Governments to make provision in our behalf for the expatriation of their citizens, it is quite indispensable that we should begin by providing for the expatriation of our own citizens."

In the debate which ensued Mr. Wilson urged

that "although the doctrine of indefeasible allegiance was unreasonable and unjust, there was not to be found among all the statutes a single affirmative challenge to this old feudalism of England; that the implied negation sought to be drawn from the American naturalization laws had no substantial foundation upon which to rest; for England had a system of naturalization also; that the Judicial Department of Government had in no case asserted a different rule; and that the Executive Department had not advanced beyond an attempt, by negotiation, to induce foreign States to consent to the adoption of a new rule of public or international law in this regard."

Mr. Pile also urged the adoption of a "distinct statutory declaration of the right of any citizen of this or any other Government to remove from the territory and renounce his allegiance to the Government where he was born," and proposed an amendment to that effect.*

No denial appears to have been given to the statements of these speakers that, whatever might have been insisted on by the executive, the existing law of America was the same as that of Great Britain; nor in truth could any such denial be given.

The bill passed the House of Representatives by a majority of 101 to 5. On being brought into the Senate, the principal clause was, however, materially modified and rendered comparatively inoffensive. It assumed the following form:—

"And be it further enacted, That whenever it shall be

* Appendix to Report, p. 51.

made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign Government, it shall be the duty of the President forthwith to demand of that Government the reasons for such imprisonment, and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen; and if the release so demanded is unreasonably delayed or refused, it shall be the duty of the President to use such means, not amounting to acts of war, as he may think necessary or proper to obtain or effectuate such release; and all the facts and proceedings relative thereto, shall, as soon as practicable, be communicated by the President to Congress."

It cannot be doubted that these disputes on the subject of allegiance have tended to produce a state of feeling which certainly ought not to exist between the two nations.

The legislation of the United States still remains without any enactment for altering what American jurists of the highest authority have declared to be the law of America with reference to allegiance. Let us hope that the legislature of this country will set the example of making the law what it is to the interest of the old world as well as of the new that it should become.

Section 3. *Claims of Protection.*

We have next to consider the converse of the case —that is to say, to what extent the Government of this country holds itself bound to afford protection, where, in the case of a twofold nationality, claims are

made on its subjects by other Governments, on the score of a right to their allegiance, to which simply as British subjects they would not be exposed.

In this respect the Government of this country has acted, it must be confessed, in modern times at least, with extreme forbearance and caution, preferring to disappoint what might have been thought the reasonable expectations of its subjects rather than advance pretensions which might clash with the rights of other powers. In the case of conflicting claims to the allegiance of individuals, British statesmen appear to have applied the legal maxim *melior est conditio possidentis*, and to have adopted the convenient doctrine that the State in whose dominions the individual happened to be was entitled to claim him.

The following extract from the Appendix to the Report of the Commissioners shows how the matter has been dealt with when a two-fold nationality has given rise to conflicting claims to allegiance.

"A conflict arises between the principle of the British doctrine of native allegiance and the statutory enactments extending that allegiance to the sons and grandsons of British subjects born within the legiance of other countries.

"Such persons, finding that they are declared by statute to be subjects of the British Sovereign, naturally look to that Sovereign for protection in return.

"The manner in which this claim is practically dealt with is shown by the following instructions to Consul Dale, of the 20th December, 1842, based upon an opinion delivered by Her Majesty's Advocate-General, and which forms the model on which all subsequent instructions to Her Majesty's Re-

presentatives or Consuls abroad upon this subject have been framed :—

" ' By the statute law of this country, all children born out of the allegiance of the King, whose fathers or grandfathers by the father's side were natural-born subjects, are themselves deemed to be natural-born subjects, and are therefore entitled to enjoy British rights and privileges while they are within British territory ; but the effect of British statute law cannot extend so far as to take away from the Government of the country in which those persons may have been born the right to claim them as natural-born subjects, at least, so long as they remain in that country.

" ' By the common law of England, all persons born within the King's allegiance, whether the children of British subjects or of foreigners, are deemed to be natural-born subjects of the Crown of England, and if the law of any foreign State be the same, by equally admitting to its rights as subjects persons born within its own territory, that country has the right to exact the service of a subject from such person, even if he be the child of a foreigner, at least whilst such child remains in the country of his birth.

" ' Therefore the children or grandchildren, by the father's side, of natural-born subjects born in any other country than Monte Video* are entitled to be protected in that country as natural-born subjects of the Crown of Great Britain. But as regards the children of British fathers born in Monte Video, such children cannot be protected against the operations of the laws affecting the subjects of that country, unless the laws of that country do not admit the child of a foreigner to the rights of a subject."†

In 1857, a correspondence having arisen respect-

* The case on which the question arose had occurred at Monte Video.

† Appendix to Report, p. 60.

ing the protection to be afforded to the children born of British parents in Buenos Ayres, in the course of which the French Government had requested to be informed as to the state of the British law on the subject, Lord Clarendon in a despatch to Lord Cowley, of December 24, writes thus:—

"The children of British subjects, although born abroad, if their fathers or their grandfathers by the father's side were natural-born subjects, are by certain British statutes to be deemed natural-born subjects themselves to all intents and purposes *in England;** but neither these statutes nor the general principles of English or international law, or of reciprocity or comity so far as Great Britain is concerned, would justify her in maintaining that such persons are 'British subjects' within the true intent and meaning of a Treaty with a foreign nation in which their case is not specially provided for; or of contending that they are, whilst residing in such foreign country, exempt from the obligations incident to their status as natural-born subjects or citizens of such foreign country of their actual birth and residence. Great Britain may confer upon them any privileges as far as her own territories are concerned, but no such privileges can avail as against or in derogation of their antecedent natural and legal obligations to the country of their birth."†

Acting on the rule adopted by his predecessor in office, the Earl of Malmesbury, in a despatch written shortly afterwards (March 13, 1858), to Earl Cowley, on the same subject, observes:—

"If a person had been born in France, of British parents,

* No such words as those printed in italics occur in the statutes referred to. The restriction of the operation of the statutes to England, is, therefore, only his Lordship's interpretation of them.

† Appendix to Report, p. 67.

and had voluntarily returned to France, he would have been a British subject in England, but he would not have been entitled to British privileges or protection in France, as against the country of his actual birth and domicil. And this, as it appears to Her Majesty's Government, is precisely the case of the children of British subjects, who are born and resident in Buenos Ayres. They are British subjects in England, but this cannot prevent their being considered and treated as Buenos Ayreans in Buenos Ayres.

"It is competent to any country to confer by general or special legislation the privileges of nationality upon those who are born out of its own territory, but it cannot confer such privileges upon such persons as against the country of their birth, when they voluntarily return to and reside therein. Those born in the territory of a nation are (as a general principle) liable when actually therein to the obligations incident to their status by birth. Great Britain considers and treats such persons as natural-born subjects, and cannot therefore deny the right of other nations (as Buenos Ayres) to do the same."*

The doctrine thus laid down may be perfectly just and founded on a proper consideration of what is due to other States, as well as very convenient in point of policy; but it seems very difficult to reconcile it with the express terms of a statute which positively enacts that children born abroad of British parents shall be "taken to be natural-born subjects of the Crown of Great Britain, *to all intents, constructions and purposes whatsoever.*"† It is difficult to suppose that the Legislature when it used this language, did not intend to place the sons of subjects, born

* Appendix to Report, page 67.

† 4 Geo. II. c. 21.

abroad, in the same position, to all intents and purposes, as natural-born subjects, and, while it rendered them amenable to the consequences of any default of allegiance, to entitle them in the fullest sense to the protection of the Crown.* Moreover it is conceded that as against any other power except one to which allegiance is due by reason of the second nationality, they would be entitled to protection; so that it cannot be said that their character of British subjects is confined to British territory.

In 1861, a new element, namely that of the domicile of the parent, appears to have been introduced into the consideration of the question as to how far the son of a British subject born in a foreign country was entitled to claim British protection. A Lieutenant Arguimban having claimed exemption from military service in Spain, as being the son of a British subject, Earl Russell, acting no doubt upon advice, writes thus to Sir J. Crampton, (July 9, 1862):—

"With respect to the particular cases of Lieutenant Arguimban and his son Mr. Joseph Arguimban, and to any other cases which may come under the same category, I am advised that they should be determined by the domicil of the parents at the time of the birth of the children within the territories of the Crown of Spain. If at the time of the birth of Lieutenant Arguimban, his father was not only a natural-born British subject but legally domiciled in the British dominions, I am of opinion that Lieutenant Arguim-

* It is probable that while Parliament thought only of conferring the benefit of British nationality on children of subjects, born abroad, the conflict of jurisdiction which might arise was lost sight of. The subject had not then been ventilated as it has been since.

ban himself was at the time of his birth a British subject, owing permanent allegiance to the British Crown, and entitled to British protection. If, on the contrary, his father was then domiciled in the dominions of the Spanish Crown, he became a Spanish subject, and is not entitled to claim British protection against any obligations resulting from his Spanish allegiance, although by an English Statute he may be also entitled to the privileges of a natural-born British subject in Great Britain.

"The same observations apply to the case of Mr. Joseph Arguimban, whose position is likewise dependent on the allegiance and domicil of his father at the time of his birth."*

There is no authority for the introduction of domicile as an element in determining the question of nationality, according to the law of England, and it therefore appears inadmissible.†

The rule adopted by the British Government may be both politic and just, nevertheless these cases afford a striking instance of the inconvenience of a two-fold nationality. The son of a British subject, though born in a foreign country may have been brought up as an Englishman and led to consider himself as such, and though resident in the

* Appendix to Report, p. 74.

† Mr. Abbott, the able Secretary to the Commission, startled at this novel doctrine, says in a note: "The tenor of this dispatch seems inconsistent with the doctrine previously held by the British Government, as it makes the nationality of the son to depend on the domicil of his father instead of the place of his own birth. It is to be presumed that the instruction was framed with reference to the peculiar law and usage of Spain, and was not intended to lay down any general principle applicable to other countries." There does not, however, appear to be any peculiarity in the Spanish law calling for the application of a new principle.

country of his birth, possibly for commercial purposes, may have no patriotic sentiments towards it, yet he may be thus constrained to serve in its armies and fight its battles.

Take the converse—a very possible case—of a person born in this country of French parents, who are domiciled here. At the age of manhood, he goes to reside in France, but without the intention of becoming a Frenchman, and with the purpose of eventually returning to England. By the law of this country he is undoubtedly a British subject. As such, by the comity of nations, he is entitled to reside in a foreign country without being liable to military service. But being born of French parents, he is also a French subject, and is therefore required to serve under the conscription, and refusing to do so, is prosecuted and punished. He claims the protection of the British Government. It is refused to him on the ground that, having placed himself, locally, within the power of the French law, this country cannot deny the right of the French Government to claim him as a subject, and must sink, till he gets back to this side of the Channel, the right to claim him as her own? Has not a subject so circumstanced just cause to complain that, having been taught to consider himself an Englishman, protection is not afforded him? On the other hand, the French Government cannot be expected to make its own law of nationality subordinate to ours in respect of a subject whom it finds within its own territory? Possibly, in time of peace, the delicate handling of diplomatic intervention might find a way out of the difficulty. But what if, unfor-

tunately, war should take place between the two countries? What will then be the position of our supposed individual with the double nationality? Is he to be French or English? "Under which King" is our "Bezonian" to fight? If taken prisoner, is he to be shot, as a Frenchman, for having borne arms against France; or to be hanged as an Englishman for having been guilty of treason against the Queen? Doubtless, in these humane days, if a man, having, under these conflicting laws, both a British and a foreign nationality, had all his life acted as the subject of one of the two countries, no Government would think of visiting him with the consequences of treason for adhering to the country he has habitually treated as his own. But there might be many instances in which it might be very difficult to say to which of two countries an individual—having perhaps connections and attachments in both—residing sometimes in the one, sometimes in the other—principally belonged, and a person so circumstanced, taking service in the one country, or the other, might find himself placed in a position of jeopardy. If the matter once came before a military tribunal or a court of law, the law must prevail. No opportunity would be afforded for diplomatic adjustment. It is surely full time that such an anomalous state of things should be put an end to.

In respect of naturalization, the Government has effectually precluded the possibility of conflict, by placing British naturalization on a different footing from that of every other nation. By the law of every other country, natu-

ralization, if valid at all, carries with it a new nationality, and invests the party naturalized not only with the status of a subject, but also with the rights, political and civil, (barring in some instances the higher political rights) which attach to that status, including the full extent of protection to which a subject can be entitled in return for the allegiance he owes to the State. In this country, on the contrary, since 1851, the Government, with a view to prevent claims for protection being made abroad by persons naturalized in Great Britain, has taken care, by the terms of the grant, to limit the effect of naturalization to the dominions of the Crown. On the 8th of January, 1851, the following circular was issued from the Foreign Office to Her Majesty's Diplomatic and Consular Agents:

"Foreign Office, January 8, 1851.

"Cases having occurred in which the holders of certificates of naturalization, issued by the Secretary of State under the Act 7 & 8 Vict. cap. 66, have put forward claims to receive from Her Majesty's Diplomatic and Consular Agents abroad the same degree of protection to which the natural-born subjects of Her Majesty are entitled, I have to inform you that Her Majesty's Government have deemed it expedient to insert a new clause in the certificates in question, which are now drawn up as follows:—"I hereby grant to (*A. B.*) all the "rights and capacities of a natural born British subject, "except the capacity of being a member of the Privy "Council, or a member of either House of Parliament, *and* "*except any rights and capacities of a natural-born British* "*subject out of and beyond the dominions of the British* "*Crown and the limits thereof.*"

"I transmit herewith, for your information and guidance,

copies of the new form of certificates now in use, and of the Act 7 & 8 Vict. cap. 66; and I have to add that the holders of these new certificates are not entitled to demand British passports, nor to claim in foreign countries British protection for mercantile firms abroad with which their houses of business in this country may be connected."*

Thus restricted, it is plain that the effect of naturalization in Great Britain is only to remove the legal disabilities of the alien, and to place him, as to certain minor political rights and as to civil rights, on the same footing as the natural subject; and further, that the oath of allegiance taken by him amounts to no more than a promise of that allegiance which every alien, while residing in the realm, is bound to render, and must be taken to carry with it the implied reservation, that it is to operate no longer than while the party remains within the Queen's dominions. When abroad he is no longer a subject. On his return to his own country, his nationality of origin, so far as this country is concerned, would revive, and, in case of war between the two countries, he might bear arms against Her Majesty without incurring, legally or morally, the guilt of treason. If the recommendation of the Commissioners that aliens shall be placed in respect of capacity for civil rights on the same footing as native subjects be adopted, this anomalous form of naturalization will become useless, and it is to be hoped will be discontinued.

* The latter clause was, however, modified as to passports, in 1854, by the addition, after the words "limits thereof," of the words "other than such as may be conferred upon him by the "grant of a passport from the Secretary of State to enable him to "travel in foreign parts." Appendix to Report, p. 96.

Section 4. *Disputes between the United States and other Countries.*

Looking upon naturalization, not as confined to the negative and inert effect given to it in this country, but as conferring the rights of citizenship not only in name but in reality, the Government of the United States has never hesitated to interfere on behalf of naturalized citizens in foreign countries, when circumstances have appeared to call for it. The disputes with this country have already been narrated. The instances in which disputes have occurred with other powers have been cases in which the naturalized citizen, prior to quitting his original country, had committed some offence against its laws, or had omitted to perform military service, which by law he was bound to render, or had left with the object of evading it, and after having been naturalized, had again returned to his former country, and had been sought to be made amenable for infringing the law. None of these cases have, however, led to any unpleasant consequences. The discussion, in all instances, appears to have been conducted with temper and moderation,* and the result has been to place in a striking light some of the questions of international law which arise upon naturalization, and has been the means of settling some of the more important of them. A few details will not therefore be immaterial to the present purpose.

* It is only when dealing with the old country that our Transatlantic friends appear always to lose their temper, and to be determined to see things in an odious and unfriendly light.

To begin with Austria:—One case, that of Martin Kozta, at first appeared to wear a threatening aspect. The facts, as detailed in the appendix to the report of the Commissioners, were these.

Kozta was a Hungarian, and one of the refugees of 1848-9. He went to Turkey, where he was arrested and imprisoned at Kutahieh, but released on condition of leaving the country. He went to the United States and made the usual declaration of an intention to become naturalized. In 1853 he returned to Turkey, and went to Smyrna on commercial business, and there obtained from the United States' Consul a travelling pass, stating that he was entitled to American protection. On the 21st of June, 1853, he was seized by some persons in the pay of the Austrian Consulate and taken out into the harbour in a boat; he was then thrown into the sea, and was picked up by a boat from the Austrian man-of-war "Hussar." The United States' Consul went on board to remonstrate, but the Captain of the "Hussar" persisted in retaining Kozta. Thereupon the United States' Chargé d'Affaires at Constantinople requested the Captain of the United States' ship of war "St. Louis" to demand Kozta's release, and, if necessary, to have recourse to force. The "St. Louis" accordingly went to Smyrna, and the Captain, in pursuance of his instructions, stated to the Commander of the "Hussar" that unless Kozta was at once delivered to him he should take him by force of arms. As a conflict between the two ships of war would have been attended with great danger to the

shipping in the port and to the town, the French Consul offered his mediation, and Kozta was then given over to his care to be kept until the decision of the respective Governments was ascertained.

On the 29th of August, 1853, the Austrian Chargé d'Affaires at Washington presented a formal remonstrance to the United States Government, protesting against the claim of the United States to afford protection to Kozta, and calling on them to disavow the conduct of their agents and to grant reparation for the insult offered to the Austrian flag.

Mr. Marcy replied on the 26th of September, 1853, contending, first, for the general right of every citizen or subject, "having faithfully performed the past and "present duties resulting from his relation to the "Sovereign Power, to release himself at any time "from the obligation of allegiance, freely quit the "land of his birth and adoption, seek through all "countries a home, or select anywhere that which "offers him the fairest prospect of happiness for him-"self and his posterity;" secondly, that Kozta was not an Austrian subject, as by a "decree of the "Emperor of Austria of the 24th of March, 1832, "Austrian subjects leaving the dominions of the "Emperor without permission of the magistrate and "a release of Austrian citizenship, and with an in-"tention never to return, become 'unlawful emi-"grants,' and lose all their civil and political rights "at home." Thirdly, Mr. Marcy put forward the somewhat startling proposition that although Kozta had not yet been naturalized and become a citizen of

the United States, yet that having become domiciled in the latter country, he was entitled to be treated in all respects as a citizen of the United States. In support of this proposition Mr. Marcy writes as follows:—

"It is an error to assume that a nation can properly extend its protection only to native born or naturalized citizens. This is not the doctrine of international law, nor is the practice of nations circumscribed within such narrow limits. This law does not, as has been before remarked, complicate questions of this nature by respect for municipal codes. In relation to this subject it has clear and distinct rules of its own. It gives the national character of the country, not only to native born and naturalized citizens, but to all residents in it who are there with, or even without, an intention to become citizens, provided they have a domicil therein. Foreigners may, and often do, acquire a domicil in a country, even though they have entered it with the avowed intention not to become naturalized citizens, but to return to their native land at some remote and uncertain period, and whenever they acquire a domicil, international law at once impresses upon them the national character of the country of that domicil. It is a maxim of international law that domicil confers a national character; it does not allow anyone who has a domicil to decline the national character thus conferred; it forces it upon him often very much against his will, and to his great detriment. International law looks only to the national character in determining what country has the right to protect. If a person goes from this country abroad, with the nationality of the United States, this law enjoins upon other nations to respect him, in regard to protection, as an American citizen. It concedes to every country the right to protect any and all who may be clothed with its nationality."

Mr. Marcy then proceeds to contend that—

"As the national character, according to the law of nations, depends upon the domicil, it remains as long as the domicil is retained, and is changed with it. Kozta was vested with the nationality of an American citizen at Smyrna, if he, in contemplation of law, had a domicil in the United States."

"There may be," he continues, "a reluctance in some quarters to adopt the views herein presented relative to the doctrine of domicil and consequent nationality, lest the practical assertion of it might in some instances give a right of protection to those who do not deserve it. Fears are entertained that this doctrine offers a facility for acquiring a national character which will lead to alarming abuses; that under the shadow of it political agitators, intent upon disturbing the repose of their own or other countries, might come to the United States with a view to acquire a claim to their protection, and then return to their former scenes of action, to carry on, under a changed national character, their ulterior designs with greater security and better success. This apprehension is believed to be wholly unfounded. The first distinct act done by them towards the accomplishment of these designs would disclose their fraudulent purpose in coming to and seeking a domicil in this country. Such a development would effectually disprove the fact that they acquired a domicil here and with it our nationality."*

The matter was eventually compromised by an arrangement between the Austrian Internuncio and the United States minister at Constantinople, that Kozta should be shipped off to the United States,

* State Papers, vol. xliv. p. 996-8. Appendix to Report, pp. 56-7. The best answer to this assertion and reasoning is to be found in the part taken by Irishmen settled in the United States in the Fenian movement in Canada and Ireland, and the sympathy, as we have shown in the last section but one, exhibited in their behalf.

the Austrians formally reserving the empty right of proceeding against him if he should return to Turkey.*

The reasoning of Mr. Marcy, which is remarkable for its boldness in carrying the doctrine of acquired nationality further than it ever has been carried, and in which the effect of domicile in respect of civil consequences is confounded with its effect as to political consequences, is altogether inadmissible. Domicile, and even residence, in a particular country entitles the party to the protection of that country only so long as he is within it; and the effect of such a rule as that contended for by Mr. Marcy would be to introduce the most lamentable confusion into this branch of the public law. Naturalization is generally, and should be always, accompanied by some authentic act, which can be referred to, and which speaks authoritatively. But if mere domicile were to give the rights of citizenship, every case would necessitate a judicial inquiry upon a matter which every lawyer knows to be, depending as it does on intention, a question often most difficult of solution.

It is therefore satisfactory to find that in the sub-

* Both parties were equally in the wrong. The Austrians had no pretence of right for seizing Kozta on Turkish territory. The arguments of Mr. Marcy on that point, which are to be found in Lawrence's note to Wheaton relative to this case, but which are too long to be inserted here, seem conclusive on this point. On the other hand, the American authorities had no right to claim Kotza as an American subject, as he had not become naturalized. The party really entitled to complain was the Ottoman Government, which refused the application of the Austrians for leave to arrest Kozta, and protested against the outrage offered to their authority, but whose protest does not appear to have been heeded.

sequent case of Simon Tousig,* Mr. Marcy no longer held the same language. Tousig, a native of Austria, had acquired a domicile in the United States, but had not become naturalized. He returned to Austria, with an American State passport, and was arrested on the charge of offences committed before leaving Austria. He appealed to the United States' Minister for protection, and the latter having brought the case before the State department, Mr. Marcy on the 10th January, 1854, writes as follows :—"I have carefully examined your despatches relating to the case of Simon Tousig, and regret to find that it is one which will not authorize a more effective interference than that which you have already made in his behalf. It is true he left the country with a passport issued from this department; but as he was neither a native born nor naturalized citizen, he was not entitled to it. It is only to citizens that passports are issued." It is true that there was, as is afterwards pointed out by Mr. Marcy, the distinguishing feature in this case, that "Tousig had voluntarily returned to his original country, and had placed himself in the power of the Austrian authorities;" but the language cited seems to show that Mr. Marcy had abandoned the theory that domicile affords a right to protection beyond the territory in which the domicile is situate. Mr. Marcy fully assents to the position that naturalization can give no immunity in respect of offences committed before

* Appendix to Report, p. 57. Lawrence, Appendix to Wheaton, Ed. 1863, p. 929.

leaving the country of origin. He goes on to say:—

"Assuming all that could possibly belong to Tousig's case—that he had a domicil here, and was actually clothed with the nationality of the United States—there is a feature in it which distinguishes it from that of Kozta. Tousig voluntarily returned to Austria, and placed himself within the reach of her municipal laws. He went by his free act under their jurisdiction, and thereby subjected himself to them. If he had incurred penalties or assumed duties while under these laws, he might have expected they would have been enforced against him, and should have known that the new political relation he had acquired, if indeed he had acquired any, could not operate as a release from these penalties. Having been once subject to the municipal laws of Austria, and while under her jurisdiction violated those laws, his withdrawal from that jurisdiction, and acquiring a different national character, would not exempt him from their operation whenever he again chose to place himself under them."

In the case of De Sandt, a Prussian by birth, who had gone to the United States, and had there declared his intention of becoming a United States citizen, but had returned to Prussia prior to naturalization, and had thereupon been ordered by the authorities to leave the country, Mr. Barnard, the United States minister at the Court of Berlin, on being appealed to by De Sandt, at once admitted that under such circumstances the claim could not be insisted on; and that "as "Sandt had quitted his residence in the United States "before perfecting his naturalization, and had again "taken up his abode in Prussia, it was impossible to "claim him as an American citizen."*

* United States Documents, 1859-60, vol. ii. pp. 9—13. Appendix to Report, pp. 52, 3.

Mr. Wheaton, one of the most distinguished of American jurists, had, on a former occasion, when United States Minister at Berlin, held similar language, on being applied to for his official interference on behalf of one Johann Knocke, a Prussian by birth, who, at the age of 21, had emigrated to America, and become naturalized there, but, having returned to Prussia, had been required to do military duty.

"It is not in my power," said Mr. Wheaton, in reply, "to interfere in the manner you desire. Had you remained in the United States, or visited any other foreign country (except Prussia), on your lawful business, you would have been protected by the American authorities, at home and abroad, in the enjoyment of all your rights and privileges as a naturalized citizen of the United States. But, having returned to the country of your birth, *your native domicil and natural character revert* (so long as you remain in the Prussian dominions), and you are bound in all respects to obey the laws exactly as if you had never emigrated."*

In like manner, in 1852, the application of a Dr. Gutowski for the intervention of the American Minister to protect him from military service was rejected on the ground that, as he had "voluntarily returned to the country of his birth, had purchased a farm there and taken up his residence, the Prussian Government had a right to regard him as a subject, and so to treat him in all respects."†

Several other conscription cases having occurred,

* United States Senate Documents, 1859-60, vol. ii. p. 6. Appendix to Report, p. 52.

† United States Documents, vol. iv. p. 43. Appendix to Report, p. 53.

Mr. Everett, on the 13th of January, 1853, furnished Mr. Barnard with instructions characterized by moderation and good sense.

"The doctrine of inalienable allegiance is, no doubt, attended with great practical difficulties. It has been affirmed by the Supreme Court of the United States, and by more than one of the State Courts; but the naturalization laws of the United States certainly assume that a person can, by his own acts divest himself of the allegiance under which he was born and contract a new allegiance to a foreign power. But, until this new allegiance is contracted, he must be considered as bound by his allegiance to the Government under which he was born, and subject to its laws; and this undoubted principle seems to have its direct application in the present cases. . . . If a Prussian subject, born and living under this state of the law (of military service) chooses to emigrate to a foreign country without obtaining the 'certificate' which alone can discharge him from the obligation of military service, he does so at his own risk. . . . For these reasons, and without entering into any discussion of the question of perpetual allegiance, the President is of opinion, that if a subject of Prussia lying under a legal obligation in that country to perform a certain amount of military duty, leaves his native land, and without performing that duty or obtaining the prescribed 'certificate of emigration,' comes to the United States and is naturalized, and afterwards, for any purposes whatever, goes back to Prussia, it is not competent for the United States to protect him from the operation of the Prussian law."

In communicating the views of his Government to Baron Manteuffel, Mr. Barnard writes:

"The Government of the United States considers that the laws of Prussia, which require a certain amount of military

service of its subjects, and which prescribe the conditions in reference to this military service on which emigration is permitted, are a matter of domestic policy, in which no foreign Government has a right to interfere. It considers also that, if a Prussian subject, born and living under this state of the law, emigrates to a foreign country without a compliance with those conditions which alone can discharge him from the obligation of military service, he does so at his own personal risk. Going abroad under the burden of a duty still due to his native Sovereign, his unauthorized emigration is in the nature of an escape from that duty and from the laws which prescribe and enforce it, and he remains liable, in spite of any contract he may enter into in the meantime of new allegiance to a foreign Power, to have these laws executed against him whenever he returns within the territorial limits and jurisdiction of his native country."*

In 1858-59, Mr. Wright, who had succeeded Mr. Barnard as the United States Minister at Berlin, finding the cases continue in which naturalized Americans who had returned to Prussia were subjected to the conscription law, urged on the American Government the necessity of taking steps to protect the interests of United States naturalized citizens, suggesting that "if a firm and decided stand were taken during the present peculiar position of affairs in Prussia, it would lead to good results, and was certainly well worthy of a trial."

We accordingly find Mr. Cass, in his instructions to Mr. Wright at this period, assuming a bolder tone, and pushing the doctrine concerning the effect of

* United States Senate documents, 1859-60, vol. ii. 53. Appendix to Report, p. 52.

naturalization in superseding native allegiance further than his predecessors had previously gone. He writes thus :—

"The right of expatriation cannot at this day be doubted or denied in the United States. The idea has been repudiated ever since the origin of our Government, that a man is bound to remain for ever in the country of his birth, and that he has no right to exercise his free will and consult his own happiness by selecting a new home. The most eminent writers on public law recognize the right of expatriation. This can only be contested by those who, in the nineteenth century, are still devoted to the ancient feudal law with all its oppression. The doctrine of perpetual allegiance is a relic of barbarism, which has been gradually disappearing from Christendom during the last century.

"The moment a foreigner becomes naturalized, his allegiance to his native country is severed for ever. He experiences a new political birth. A broad and impassable line separates him from his native country. He is no more responsible for anything he may say or do, or omit to say or do, after assuming his new character, than if he had been born in the United States. Should he return to his native country, he returns as an American citizen, and in no other character. In order to entitle his original Government to punish him for an offence, this must have been committed while he was a subject and owed allegiance to that Government. The offence must have been committed before his expatriation. It must have been of such a character that he might have been tried and punished for it at the moment of his departure. A future liability to serve in the army will not be sufficient, because before the time can arrive for such service he has changed his allegiance, and become a citizen of the United States. . . . . I confine the foreign jurisdiction, in regard to our naturalized citizens, to such of

them as 'were in the army or actually called into it' at the time they left Prussia, that is, to the case of actual desertion or a refusal to enter the army after having been regularly drafted and called into it by the Government to which at the time they owed allegiance."*

On the breaking out of the civil war in America, many instances occurred in which naturalized subjects, in order to avoid military service, quitted America, and returned to their native country. In March, 1863, Mr. Seward, preferring to sacrifice the cherished doctrine of the effect of naturalization to asserting it on behalf of such unworthy subjects, writes to Mr. Judd, the United States Minister at Berlin:—

"Instances have occurred where Europeans who have become naturalized citizens of the United States have left the country when their services were required, and returned to Europe to avoid needful duty here, and then have invoked the protection of the United States to screen them from military duty there. Henceforth you will make no further applications in these military cases without specific instructions."†

In 1865, the civil war having come to an end, many persons—according to the report of the American Minister, not less than 500 in number—who had become naturalized in America, many of them by serving for the prescribed period in the American army, having returned to Prussia, were now threatened with compulsory conscription. Mr. Wright, who

* United States Diplomatic Correspondence, vol. iii. Appendix to Report, p. 53.

† Appendix to Report, p. 53.

in the meantime had been reappointed Minister at Berlin, endeavoured to effect an arrangement in their favour; and the United States Government, now relieved from the pressure of the fearful struggle it had gone through, resumed its cherished purpose of obtaining a recognition of the rights of its naturalized citizens, and of their entire immunity from liability to their former Governments. On the 2nd of December, Mr. Seward thus instructs Mr. Wright:—

"Considerations of ease and policy prevailed with this Department to allow the subject to rest during the continuance of the war. We became even less anxious upon the subject when it was seen that worthless naturalized citizens fled before the requirement of military service by their adopted Government here, and not only took refuge from such service in their native land, but impertinently demanded that the United States should interpose to procure their exemption from military service exacted there. Those circumstances, however, have passed away and the question presents itself in its original form. The United States have accepted and established a Government upon the principle of the right of men who have committed no crime to choose the State in which they will live, and to incorporate themselves as members of that State, and to enjoy henceforth its privileges and benefits, among which is included protection. This principle is recommended by sentiments of humanity and abstract justice. It is a principle which we cannot waive."*

A long negotiation ensued, which it would be foreign to the present purpose to pursue through its

* United States Diplomatic Correspondence, 1865, vol. iii. p. 65. Appendix to Report, p. 54.

details. It ended in a treaty between the United States and Prussia, on behalf of the North German Confederation, of the 22nd of February, 1868. By this treaty, which is to remain in force for ten years from its date:—

"Citizens of the North German Confederation who have become naturalized citizens of the United States of America, and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such.

"Reciprocally: citizens of the United States of America who become naturalized citizens of the North German Confederation, and shall have resided uninterruptedly within North Germany five years, shall be held by the United States to be North German citizens, and shall be treated as such.

"The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization.

"A naturalized citizen of the one party, on return to the territory of the other party, remains liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration; saving always the limitation established by the laws of his original country.

"If a German naturalized in America renews his residence in North Germany without the intent to return to America, he shall be held to have renounced his naturalization in the United States.

"Reciprocally: if an American naturalized in North Germany renews his residence in the United States without the intent to return to North Germany, he shall be held to have renounced his naturalization in North Germany.

"The intent not to return may be held to exist when the

person naturalized in the one country resides more than two years in the other country."*

This treaty is ambiguous and open to difficulty on two points: 1st. it is left uncertain whether the five years residence required by the first article, is to run from the time of the naturalization, or whether prior residence will be available to satisfy the condition; 2ndly, it is left in doubt whether on naturalized subjects quitting the country of adoption *sine animo revertendi*, and returning to their native country, and thereby losing the citizenship of the former, the original nationality would revert. The Prussian law makes naturalization in a foreign country carry with it the absolute loss of Prussian nationality, without any provision as to the right reviving in the event of a return to the country of birth. It would, however, seem, from the number of cases in which the Prussian authorities have sought to enforce the Conscription Laws against Prussians naturalized in America and afterwards returning to Prussia, that they are content to take back these repentant subjects —at all events if fit for military service—without seeking to enforce against them the law which declares them no longer Prussian subjects.

The discussions which have taken place between the Government of the United States and that of France have, as in the case of Prussia, all turned on the liability of native Frenchmen, naturalized in America and afterwards returning to France, to serve

* Appendix to Report, p. 149.

under the Conscription, or to undergo the penalties imposed by the law for having quitted France to avoid military service. The language of Mr. Cass in 1859, on instructing the United States Minister at Paris to procure information on the French law of naturalization, shows the extent to which the United States Government were prepared to maintain the efficacy of American naturalization :—

"This Government maintains the right of expatriation and naturalization, and maintains also that if a foreign-born citizen, naturalized here, returns to his native country, he is not liable to military duty, except such as was actually due and which he had been called upon to perform before his emigration. In any communication you may have with the Minister for Foreign Affairs you will make known to him these views of the United States."*

In 1860, on the occurrence of the case of Michel Zeiter, who was prosecuted for having evaded service under the Conscription, Mr. Faulkner, the United States Minister, thus addresses Monsieur Thouvenel :—

" Our doctrine is that the naturalized emigrant cannot be held responsible upon his return to his native country for any military duty, the performance of which has not been actually demanded of him prior to his emigration. A prospective liability to service in the army is not sufficient. The obligation of contingent duties depending upon time, sortition, or events thereafter to occur, is not recognized. To subject him to such responsibility, it should be a case of actual desertion or refusal to enter the army, after having

* Senate Documents, 1859-60, vol. ii. p. 198. Appendix to Report, p. 58.

been actually drafted into the service of the Government to which he, at the time, owed allegiance."

The case of Zeiter just referred to, as well as the cases of Alibert and others, referred to in detail in the Appendix to the Report of the Commissioners*, and commented upon in the ably reasoned Report of Monsieur Treitt to the British Embassy,† together with the judgment of the Court of the Tribunal de première instance of the arrondissement of Wissembourg, given in the Appendix,‡ establish, on the one hand that, inasmuch as, by the law of France, none but Frenchmen can serve in the French army, and by the naturalization of a Frenchman in a foreign country French nationality is at once destroyed, a Frenchman who has been naturalized in a foreign country cannot be called upon to serve under the Conscription or punished for refusing to serve: on the other hand, inasmuch as the omission to serve when called upon is an offence to which the law of France attaches penalties, and as an offence once committed against the law of the native country is not, and cannot be, purged by subsequent naturalization elsewhere, but remains punishable if the offender shall afterwards be found within the jurisdiction—just as an offence committed by the natural-born subject of another state would do, if the offender should leave the country for a time and afterwards return to it—whenever a Frenchman bound to serve under the Conscription leaves his country in order to avoid the

* Page 57. † Appendix, p. 21. ‡ Appendix D. p. 87.

service, the offence being complete, he still remains amenable to the French law, notwithstanding subsequent naturalization, if found on French territory. The French tribunals, however, hold that the French law of limitations in penal matters, which in such a case would be three years, begins to run from the time the offence is complete, which would be from the time of leaving France, and that, consequently, an absence of three years from France protects the offender from all further pursuit.

Whether leaving the country before being actually called upon to serve, but on the eve of becoming liable to be so called upon, with a view to avoid it, will suffice to constitute the offence, or whether, as contended by the American authorities, the service must have been actually due and demanded prior to emigration, is a question which does not appear to have been decided by the French tribunals, and on which, in the absence of decision, it would be rash to offer an opinion.

Section 5. *Results of foregoing Discussions.*

The following propositions as to the effect of naturalization, in the view of other nations than our own, may be stated as evolved from the laws which have been set forth and the discussions which have been detailed:—

1. That naturalization, as occurring in other countries, and as distinguished from the incomplete and inefficacious form of it known in this, has the effect—

at all events where the preliminary conditions, if any, by which the party to be naturalized could denationalize himself and divest himself of his former allegiance, have been fulfilled—of conferring to all intents and purposes, a new nationality, and at the same time of destroying the old—of placing the party naturalized in the position of a natural-born subject or citizen in relation to the State which adopts him, and at the time of dissolving the ties which bound him to the parent State and freeing him from all obligations of allegiance or duty to its Sovereign or Government.

2. That nothing short of actual naturalization, carried out by such solemn and formal Act as the law of the particular country may require, will have this effect. Domicile, residence preliminary to naturalization, declaration of intention, with renunciation of former allegiance or rights, will not suffice to give the character of citizen or subject of the country of adoption, which can be acquired only by the act of naturalization itself.

3. That the effect of naturalization is prospective only, and has no retroactive operation. Therefore if a subject, on expatriating himself, leaves public duties unfulfilled, the non-performance of which renders him liable to legal consequences, or by the act of emigration itself commits an offence against the law of the country he abandons, naturalization will afford him no protection, if found within the territory of the latter, and called upon to answer before the law.

4. On the other hand, naturalization will entitle him to immunity, though found again on the soil of his

native country, against any future claims made on him as its citizen or subject, unless he has returned to it with the intention of abandoning the country of naturalization, and such abandonment by the law of the latter has the effect of destroying the character and status of naturalized subject.

CHAPTER V.

ALIENS.

SECTION 1. *Rights and Disabilities in general.*

It has been pointed out that the effect of naturalization in this country is little else than to remove the civil disabilities which attach to the position of an alien. This being so, a question presents itself which it is important to dispose of before considering how far the present system of naturalization may require amendment—namely, whether the civil disabilities of aliens should be continued. Political disabilities may be put out of the question. By the common law of nations, the exercise of political rights—in other words, the capacity to take a part in legislation or government, or the means of influencing the action of the legislature or of the government in matters relating to the general interests of the particular political community—is reserved to such as are members of the community, to the exclusion of those, who, though residing within its territory, belong to another State which may have different or perhaps hostile interests to promote.

By the general comity of nations, aliens are allowed to travel and reside in other countries—subject in some to special regulations of police—so long as the e sp ective nations are at peace.* At the same time, by the law of many countries a power is vested in the

* In modern times aliens are often permitted to remain, even in time of war; but this is entirely at the discretion of the Government and forms no part of the law of nations.

Government, either for cause, or at discretion, to direct the removal of the alien.

By the same comity of nations, an alien is entitled to the protection of the country in which he may be; and in return for this protection owes obedience to the law, and temporary allegiance to the Sovereign or State; so as to be liable, like the natural born subject, to the penalties which attach to the violation of the law, and this to the extent of being punishable for treason for any attempt against the State, even though his own country should be at war with it, if he has been permitted to reside during time of war.

Aliens are everywhere allowed to intermarry with the subject; to possess personal property; to trade, and to enforce contracts made with them: beyond this their capacity differs exceedingly in different countries. But the tendency of modern legislation has been to relieve them from disability. Let us first see in what position aliens are placed by the law of this country.

SECTION 2. *Position of Aliens in this country.*

By the common law, an alien could not hold landed property: he could not even take the lease of a house. Till the end of the 13th century, foreign merchants residing here lived in lodgings, and their landlords acted as their brokers and sold their merchandize for them.

The jealousy of foreigners appears to have dated from the earliest times. It is stated by Lord Coke, that by the antient Kings, amongst whom King Alfred was one, it was forbidden that any alien merchant should make his haunt in England, except at

the four fairs, or sojourn in the land above forty days.* Till upwards of two centuries after the Conquest, it appears that strangers were not permitted to reside here, even on account of trade, beyond a limited time, except by special warrant. They were considered only as sojourners, coming to a fair or market, and were obliged to employ their landlords as brokers to buy and sell their commodities; and one stranger was often arrested for the debt, or punished for the misdemeanour, of another.† Anderson, in his History of Commerce, states that, as late as 1276, it was a general rule in England, that the aggregate body of every particular nation of foreigners residing here was obliged to answer for the misdemeanours of every individual belonging to it.‡

The gross impositions and exactions practised by King John on foreign merchants had, however, occasioned a provision to be made in Magna Charta for their protection. "All merchants"—which Lord Coke shows to have meant merchant strangers in amity—"if they were not publicly prohibited before, were to "have safe and sure conduct, 1, to depart out of Eng-"land; 2, to come into England; 3, to tarry here; 4, "to go in and through England, as well by land as by "water; 5, to buy and to sell; 6, without any manner "of evil tolls; 7, by the old rightful customs."§

In the reign of Edward I. aliens were enabled to proceed summarily for their debts,‖ and, by Charter,

* 2 Inst. 57. † Chitty, Com. Law, vol. i. p. 131.
‡ Hist. Com. vol. i. p. 237-42.
§ 2 Inst. 57. ‖ 11 Edw. I.

were permitted to hire houses of their own, and to dispose of their goods themselves.* But the citizens of London, irritated at the loss of their brokerage and the favours thus shown to foreigners, speedily took alarm. In the Parliament Roll of the 18th Edw. I. appears the following petition: "*Cives London petunt* "*quod alienigenæ mercatores expellantur a civitate,* "*quia ditantur ad depauperationem Civium, &c.*" To which the King makes this pertinent answer: "*Responsio: Rex intendit quod mercatores extranei* "*sunt idonei, et* UTILES MAGNATIBUS, *et non habet* "*consilium eos expellandi.*"†

This relaxation of the ancient rigour in allowing merchant strangers to hire houses for their residence, while aliens in general could not take leases of lands or houses, appears to have been made for the encouragement of commerce. "For," as it is pithily said by a learned author, "if an alien trade here, he must have an abode among us." Nevertheless, if such merchant departed the kingdom—at least without leaving servants in his house during his absence,‡ —or died, the lease would go to the King; the reason of the latter being, it was said, that it was only a personal privilege annexed to the alien for the encouragement of commerce, and must therefore expire with him, instead of going to his executors or administrators.§

* Rymer, vol. iv. p. 361. 1 And. Hist. Com. 268.

† 2 Inst. 741. ‡ Dyer, 2, 6.

§ Co. Litt. 2, 6. Com. Dig. Alien B. Bac. Abr. Alien C. The privilege was confined to merchant strangers, and even a merchant could not take land unnecessary to his habitation. Co. Litt. 2 b, 1 Roll. 194. Com. Dig. u. s. Well might it be asked by Mr.

Narrower views appear to have prevailed in the reign of Henry VIII. than those entertained in the days of the Edwards. For, by the 32nd Hen. VIII. c. 16, § 88, it is enacted that all leases of any dwelling house or shop within the realm or any of the King's dominions made to any stranger artificer or handicraftsman, born out of the King's obeisance, not being denizen, shall be void and of no effect; and the person so taking such lease shall forfeit £100, and the person letting £100 more, one moiety to the King, the other to him that will sue for the same.

It is certainly a remarkable thing that no amendment of this harsh and impolitic law should have been made prior to the statute of the 7 and 8 Vic. c. 66. However, by the 4th section of that Act, "every alien, "being the subject of a friendly state, is empowered "to take and hold every species of personal property, "except chattels real, as fully and effectually as if he "were a natural born subject. And every alien re-

Hargrave, "If this be the common law, ought not its severity to be corrected by the legislature? To deny the right of taking a house for habitation to aliens not being merchants is like forbidding all other foreigners to come and reside here." It is true Mr. Hargrave throws some doubt as to such being the law by referring to Calvin's Case, 7 Co. R. 17, observing that there Lord Coke, speaking of the right to take a house for habitation as an exception to the general rules as to the incapacity to hold real property, seems to express himself without distinguishing between aliens being merchants and others. Hargrave, Co. L. 2 b, n. 7. But on reference to the passage in the report, and to the reason given by Lord Coke for the exception, viz., that "if aliens should be disabled to acquire and maintain these things, it were in effect to deny them trade and traffic, which is the life of every island," it would seem that Lord Coke had traders only in view.

" siding in this kingdom may (by any mode of acqui-
" sition) take and hold any lands, or houses, or other
" tenements for the purpose of residence, or of occu-
" pation by himself, or his servants, for the purpose of
" any business, trade, or manufacture, for any term of
" years not exceeding twenty-one, as fully and effectu-
" ally, except the right to vote at elections for Members
" of Parliament, as if he were a natural born subject."

Beyond the right thus given of taking a lease of real property for the purpose of residence or business for the term of twenty-one years, the incapacity of aliens as to holding real estate, whether in fee, or for life, or for years, remains as before. An alien may, it is true, purchase landed estate, but if freehold, the Sovereign will be entitled to it, and on office found it will vest in the Crown; if copyhold it will escheat to the lord.*

Being incapable of holding real estate, an alien is incapable of inheriting it. By the common law he was incapable of transmitting an estate by descent; so that wherever it was necessary to trace descent through an alien, it was not possible to inherit: in other words, no one who derived his blood or relationship through an alien, could inherit from another; so that a nephew could not inherit from an uncle, nor an uncle from a nephew, where the father was an alien; nor could the son of an alien, though born within the realm, inherit from his grandfather, for he must inherit *mediante patre*.† This cruel law was, however,

* Ventris, 413, 416, 418, Com. Dig. Alien C (1), C (2).

† Ventris, *Ib.* Com. Dig. Alien, *Ib.*

cured, in favour of natural born subjects, by the 11 and 12 Will. III. c. 6. by which it is provided that they may derive title by descent through an alien ancestor.

Any attempt to evade the law by having landed estate conveyed to a trustee for the benefit of an alien would be useless. The trustee would be held in equity to be seized of the property for the benefit of the Crown.*

And as an alien cannot be seized of or hold real estate, it seems that he cannot be a trustee of real estate for the use or benefit of another, or as such make a good conveyance of it to a purchaser.†

It should, however, be observed, that if an alien purchase landed estate, as he thereby becomes seized, it is only on proceedings being taken by the Crown, or as it is termed on office found, that the estate vests in the latter. If therefore no such proceedings are taken, there is nothing to prevent the alien from possessing and enjoying it, or as it seems from disposing of it. But as land cannot be inherited from an alien it seems that on his death the freehold and inheritance will vest in the Crown by law, without office found.‡ An alien has consequently no power to devise real estate.

* Com. Dig. Alien C. (3.)

† *Ib.* C. (4.) Gilb. on Uses, p. 43, Fish *v.* Klein, 2 Mer. R. 431. A Court of Equity would not, however, allow the trust to fail on that account, as the rule there is that a trust shall never fail for want of a trustee. Lewin on Trusts, c. 25.

‡ Com. Dig. Alien. C. (2.)

If an alien purchase lands or tenements to him and his heirs, he takes the fee simple, but on office found it goes to the King,

An alien husband cannot be tenant by the courtesy of the estate of his wife being a subject.* An alien woman married to an Englishman was not entitled to dower at the common law;† but by an Act of Parliament, not printed (Rot. Parl. 8 Hen. 5, n. 15.) "All women aliens, who henceforth should be married to Englishmen by license of the king, are "enabled to demand their dower after the death of "their husbands, to whom they should come in time "to be married, in the same manner as English-"women."‡

This statute applied only to alien women married to subjects with the license of the king; but the 7 and 8 Vict. c. 66, has, as we have seen, removed every disability of alien women married to subjects.

As regards personal property, an alien is under no disability. An alien might at the common law acquire property in goods, money, or other personal estate, "An alien friend," says Lord Coke, "may by "the common law have, acquire and get within the "realm, by gift, trade, or other lawful means, any "treasure, or goods personal whatsoever, as well as "any Englishman, and may maintain an action for "the same §

who shall have it by his prerogative, of whomsoever the lands are holden. Ce. Litt. 2, b.

If an alien purchase to him and the heirs of his body, he is tenant in tail; and if he suffer a recovery and afterwards an office is found, the recovery is good to bar the remainders. Com. Dig. C. (2).

* Calvin's Case, 7 Rep. 25 a. † Com. Dig. Alien. C. (1.)

‡ Hargrave, Co. Lit. 31 b. n. 9.

§ Calvin's Case, 7 Co. R. 17 a. The 4th section of the 7 & 8

Being capable of acquiring personal property, an alien is equally capable of disposing of it by any means by which such property may be transferred, including testamentary disposition.* He may be an executor or administrator,† and, as to personal property, may be a trustee like anybody else.

As regards trade and manufactures, the wise and liberal policy of Edward the First, was followed by enactments conceived in the like spirit in the reign of Edward III. By a statute of 9 Edw. III. st. 1, c. 1, it was enacted "That all merchants, strangers, and "others might deal in all things vendible within the "realm, and sell to any but the king's enemies, notwith- "standing any franchises or usages to the contrary, "save the king's customs." And persons disturbing alien merchants in the protection given by this statute, are subjected to double damages. To this enactment, however, was added an exception, forbidding aliens to carry wine out of the realm. By the statute of the Staple, 27 Edw. III. st. 2, c. 17, the practice of arresting one alien for another's debt was put an end to, and time was allowed for aliens, in case of war, to remove

Vic. c. 166, which enacts that "Every alien, being the subject of a friendly state, shall and may take and hold, by purchase, gift, bequest, representation, or otherwise, every species of personal property, except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural-born subject of the United Kingdom," adds nothing to the Common Law, and may be taken as declaratory only.

* Williams on Executors, p. 11.

† Com. Dig. Admin. B. (6,) Williams on Executors, pp. 220, 415.

with their effects. There is an honesty of purpose and a simplicity in the quaint language of this noble statute, which make it pleasant to read.

"Merchants of enemies' countries shall sell their goods in convenient time and depart; no merchant stranger shall be impeached for another's debt, whereof he is not debtor, pledge, nor mainpernor: Provided always, that if our liege people, merchants, or others, be endamaged by any lords of strange lands, or their subjects, and the said lords duly required fail of right to our said subjects, we shall have the law of marque, and of taking them again, as hath been used in times past, without fraud or deceit; and in case that debate do arise (which God defend) betwixt us and any lords of strange lands, we will not that the people and merchants of the said lands be suddenly subdued in our said realm and lands because of such debate, but that they be warned, and proclamation thereof published, that they shall void the said realm and lands, with their goods, freely, within forty days after the warning and proclamation so made; and that in the meantime they be not impeached, nor let of their passage, or of making their profits of the same merchandizes, if they will seek them. And in case that for default of wind, or of ship, or for sickness, or for other evident cause, they cannot avoid our said realm and lands within so short a time, then they shall have other forty days, or more, if need be, within which they may pass conveniently with selling their merchandize as aforesaid."

By 36 Edw. III. c. 7, a court was constituted, composed partly of foreigners, to try mercantile causes, and other regulations in favour of alien merchants were made. In the succeeding reign of Richard II, the statutes of his predecessor in favour of aliens were explained and confirmed; and in 14 Richard II, it was expressly enacted "that merchant

strangers repairing into the realm of England shall be well and courteously and rightfully used and governed in the said realm, to the intent that they shall have the greater courage to repair into the same."

But in the latter part of this reign a retrograde policy took the place of the wiser legislation which had preceded it; and, from this period till comparatively recent times, a series of statutes placed restrictions on the freedom of merchants to trade within the realm. It would be beyond the limits of the present treatise, as well as beyond the scope of the present purpose, to trace the various provisions of this fluctuating but generally mischievous legislation.* Suffice it to say that these enactments have gradually disappeared from the statute book, and that now the foreigner can carry on trade or industry within the dominions of the crown as freely as the subject. The law gives also the same rights in respect of copyright, patents for inventions, trade marks, and the like, to the foreigner as to the subject.

To this general position there is one exception; but it is one which is founded on general policy rather than on any restraint on trade or intended preference of the subject over the foreigner. None save a British subject, either by birth, denization, or natu-

* A summary of these statutes, which is by no means without interest as exhibiting the fatal errors of past ages, the spirit of which has only been finally subdued in our own day, will be found in Tucker's able treatise on the Naturalization Bill, as also in Chitty's Commercial Law, Vol. 134—40, a work which does infinite credit to its indefatigable author, as exhibiting sound views of commercial policy, combined with extensive legal and historical research.

ralization, can be owner of a British ship, so as to be entitled to the protection of the British flag, or to satisfy the Registry Act.* It is obviously one thing to give perfect freedom of trade or industry to foreigners within the limits of the Queen's dominions, and another to afford the national character and the protection of the British flag to those who, once beyond the limits of British territory, are no longer subject to our laws, and who might compromise us with other nations without being amenable to our jurisdiction.†

In respect of personal rights, the alien, so long as he remains on British soil, is in the same position as the Queen's subjects. The Courts of this country are open to him—as against foreigners, in respect of wrongs for causes of action arising within the jurisdiction, and in respect of breach of contract for causes of action arising either in this country or abroad—as against British subjects, in respect of any cause of action wheresoever arising.

Thus far we have been speaking of aliens who are

* "The Register," says Mr. Machlachlan, in his excellent treatise on Merchant Shipping (p. 27, n. 1), "serves a municipal purpose and contemplates an international object. It ascertains the ownership of property, for the convenience of Her Majesty's subjects, and it reserves for them the protection and honour of the British flag."

† Even a British subject is incapacitated from owning British shipping, if he has taken an oath of allegiance to a foreign sovereign or state, unless he afterwards takes the oath of allegiance to the Queen, and continues resident in Her Majesty's dominions, or is a member of a British factory, or partner in a house actually carrying on business within Her Majesty's dominions.—17 and 18 Vic. c. 104, § 18.

subjects of States at peace with Great Britain; but a distinction is to be observed between what is called an alien friend and an alien enemy, or one with whose country this kingdom is at war. An alien enemy has no civil rights in this country, unless he is here under a safe conduct or license from the Crown. In modern times, however, on declaring war, the Sovereign usually, in the proclamation of war, qualifies it by permitting the subjects of the enemy resident here to continue, so long as they peaceably demean themselves; and without doubt such persons are to be deemed alien friends. An alien enemy cannot trade with the subjects of the realm. A contract made by or with him is void, and cannot be enforced here even after peace is restored. But the right of an alien enemy to sue in respect of a cause of action arising before war is only suspended while the war lasts, and will revive on peace being restored. A British subject, and *a fortiori* a neutral, residing in an enemy's country during time of war, is looked upon as an alien enemy, and as under the same disabilities.*

When plaintiff, a foreigner may be called on to give security for costs; when defendant in an action brought to recover £20 or upwards, if there is reasonable cause to believe he is about to quit the country, he is liable, on an order being made by a judge, to be arrested before judgment:—but herein he is only in the same position as the subjects of the realm.

* McConnell *v.* Hector, 3 Bos. & P. 113; Omealy *v.* Wilson, 1 Camp. 481; Deluneville *v.* Phillips, 1 New R. 97.

An alien is subject to the bankrupt laws, and is entitled to the benefit of them.*

It thus appears that the incapacity of aliens consists in three things.

1. They are incapable of any political rights, including that of holding any office of trust.

2. They cannot hold landed estate except for a term not exceeding twenty-one years.

3. They cannot own British ships.†

The incapacity to hold landed estate is said by some to have arisen from the feudal law, according to which no one could purchase lands without being obliged to fealty to the lord of whom they were holden; so that an alien, who owed a previous faith to another prince, could not take an oath of fidelity in another sovereign's dominions.‡

But the true reason for such a law, or at all events for its continuance, is rather to be found in the narrow spirit which led men to look with jealousy and dislike on all who were not members of the same community, political, commercial, or industrial, as themselves—a spirit which has exercised a mischievous influence even to our own times, and which, in some parts of the world, can hardly yet be said to be finally laid. This jealousy and the laws relating to foreigners engendered by it were once

* 6 Geo. IV. c. 16, § 135.

† The incapacity to sit on juries can scarcely be considered as the denial of a civil right; it is rather an exemption from an onerous duty.

‡ Spelman tit. Ligeantia, p. 368.

common to the world; but many nations have seen the impolicy of such restrictions, and have amended their laws.

SECTION 3. *Position of Aliens in other Countries.*

To the French nation belongs the merit of having been the first to set the example of a more liberal and enlightened legislation. Yet nowhere had the exclusion of strangers from civil rights been carried to a greater length.

Under the ancient law of France strangers were described under two names, *Aubains* (alibi nati), if the country of their birth was known, *Épaves*,* if they came from a distance and it was unknown to what country they belonged.

The condition of both in point of civil rights was little better than that of serfs. They were liable to pay an annual toll. They could not marry with a French subject unless with the consent of the seigneur, under the penalty of a fine; and even when such consent had been obtained, they were subject to what was called the *for-mariage*, which consisted of the forfeiture to the lord of one third, or one half, according to the custom, of the property of the subject thus intermarrying with the foreigner. Aliens might, indeed, acquire and dispose of property in France by acts *entre vifs*, but they were incapable of inheriting or of acquiring property by testamentary disposition,

* Épave signifies the same as our word "waif" or "stray." "On appele ainsi les choses égarées, dont on ne connoit pas le propriétaire. Repertoire de Jurisprudence ad verb."

or of bequeathing their property to above the value of five sols; nor could any persons inherit from them, except their children born within the territories of France.*

The law relating to foreigners was designated by the well known term of Droit d' Aubaine; though that term is generally used in the more restricted sense, in which it designates the right, exercised by the State, of taking the property of foreigners dying in France without leaving children born within the kingdom.† As the foreigner was incapable of bequeathing his property by will, and no other relations, though subjects and living in the kingdom, except children born within it, could succeed, on failure of the latter the property became *bonum vacans*, and as such, as a necessary consequence, fell to the lord, which in most cases would be the King.‡

Besides the disability stated, foreigners were also

* Pothier, des personnes, part I. tit. I., sect. 2, Repertoire de Jurisprudence ad. v. Étranger. It is stated in the latter work that if the alien had any children born within the kingdom, this rendered other children, born out of it, capable of inheriting from him. But this seems doubtful.

† It is said that the Droit d'Aubaine applied to the succession of a foreigner dying out of France only in the case of a Frenchman naturalized in a foreign country.—Merlin, Repertoire de droit Verb. Aubaine.

‡ The Droit d'Aubaine was discontinued as regards British subjects from the year 1713. By the 13th article of the Treaty of Navigation and Commerce entered into between Great Britain and France at the Peace of Utrecht, and the Ordinance of the King of France which followed it, the property of British subjects dying in France became exempted from the law.—Cole on the Domicile of British subjects in France, p. 2.

incapable of holding any office or exercising any public function within the kingdom, or of holding any ecclesiastical benefice without the licence of the king. Any benefice conferred on a foreigner without such licence became *ipso facto* vacant.*

The rigour of the droit d'aubaine, had however, been mitigated in one important particular prior to the Revolution. The succession to a foreigner dying in France, instead of falling to the crown, was allowed to go to his relations if domiciled in France.†

Thus the law remained till the Revolution, when larger and more cosmopolitan views prevailed. By a law of 1790 the droit d'aubaine was abolished. By a law of 1791, foreigners were rendered capable of succeeding to the property of their relations in France, though such relations might not be French, and of acquiring and disposing of property by all means authorized by the law.

In passing these laws the Constituent Assembly had been actuated by the expectation that the example thus set would be followed by reciprocity on the part of other nations in relaxing the rigour of laws restricting the capacity of foreigners; but the general aversion produced by the excesses of the revolutionary period were anything but favourable for the adoption of changes emanating from such a quarter, and the European wars which broke out shortly afterwards diverted attention from the subject of legal reforms. The framers of the Code, therefore, finding

* Repertoire de Jurisprudence, u. a.

† Merlin, Repert. de droit. Verb. Aubaine.

that the great concessions made by France in favour of foreigners had not been followed by corresponding concessions on the part of other nations, receded somewhat from the liberality which had characterized the legislation of the preceding period. They enacted that the enjoyment of civil rights by a foreigner should be co-extensive only with the rights accorded to Frenchmen by treaties between the nation of the foreigner and France.*

Carrying out this principle, the 726th article of the Code Civil provided that a foreigner should succeed to the property which a relation, whether foreigner or Frenchman, possessed in France, only where a Frenchman would in like manner succeed to the property of a relation in the country of the foreigner—a rule equally applicable to moveable and immoveable property, and whether the succession was testamentary or *ab intestato*.†

In like manner, Article 912 provided that a disposition of property in favour of a foreigner could only be made where the foreigner in his own country could in like manner make a disposition in favour of a Frenchman.

It is to be observed, however, that the framers of the code by no means re-established the droit d'au-

* Code Civil, Art. II. By the terms of this article, reciprocity afforded by the law of the foreign country would not suffice; it must result from treaty: the reason, it is said, being that the rights of foreigners in France would otherwise have been made to depend on legislation to which France was not a party. Rogron, Code Civil, note to Art. II. Demolombe, § 241, vol. i. p. 357.

† Rogron, Code Civil, note to Art. 726.

baine as regards the right of the State. The effect of Art. 726 was only that, if the foreigner was incapable of inheriting, the property went to the next heir capable of taking; neither does the Code anywhere deprive the foreigner of the right to make a will. On the other hand the 912th article increased the rigour of the antient law by making the foreigner incapable of acquiring, except in case of reciprocity, by act *entre vifs*, which by the old law he could always have done.*

But both the 726th and 912th articles of the Code were abrogated by a law of the 14th July, 1819; and the result is that as regards the acquisition and disposal of property of every description in France, the foreigner now stands in all respects on the same footing as the Frenchman.†

Foreigners have further been rendered capable, by express laws, of holding shares in the Bank of France; of obtaining concessions with respect to mines; of possessing literary property; of obtaining patents.‡

* The old maxim was Peregrinus liber vivit, moritur servus. Merlin, Repertoire de Droit, Verb. Aubaine.

† Demolombe, Cours de Code Napoleon, § 244, vol. i. p. 392.

‡ Demolombe, Cours de Code Nap. § 242, vol. i. p. 387.

Monsieur Treitt thus sums up the result of the existing legislation:

"Tous les étrangers, sans la moindre restriction, ont, en France, le droit de succéder, de disposer, de recevoir; il n'y a aucune distinction entre les biens meubles et les biens immobiliers; l'egalité entre les nationaux et les étrangers est *absolue*, que les étrangers soient en France ou hors de France. Cet état de choses existe depuis la loi du 14 Juillet 1819, qui a abrogé les Articles 7 62 et

Foreigners may have recourse to the French tribunals, against a Frenchman for a cause of action wheresoever arising; but against another foreigner only where the cause of action arises out of or relates to commerce or trade; or where the object of the demand is situate in France; or where the suit is instituted to obtain reparation for a personal wrong; and generally where any treaty with the country of the foreigner confers the right. It seems, indeed, that

912 du Code Napoléon, et aboli tous les droits qui frappaient les étrangers, tels que droits d'aubaine, &c. Cependant cette loi contient une seule restriction qui est toute d'équité: 'Dans le cas de partage d'une même succession entre des cohéritiers étrangers et Français, ceux-ci prélèveront sur les biens situés en France une portion égale à la valeur des biens situés en pays étranger, dont ils seraient exclus, à quelque titre que se soit, en vertu des lois et coutumes locales.'

"Les étrangers comme les Français peuvent acquérir des biens en France, les hypothéquer, les aliéner, et faire à leur égard tous les contrats permis par la loi. Ils ont le droit de prescription.

"Le commerce et l'industrie sont absolument libres pour les étrangers; ils exercent le droit industriel à l'égal des regnicoles, et peuvent obtenir toutes espèces de concessions; même celle de mines.

"La propriété industrielle, artistique et littéraire a été l'objet des traités internationaux.

"Das les communes ou les étrangers résident, ils participent à certaines jouissances communales, telles que la vaine pâture, la distribution du bois des forêts appartenant aux communes, &c.

"En un mot, on peut dire que, en ce qui concerne le statut réel, *le droit de propriété*, les étrangers sont dans une condition identique à celle des Français.

"Quant au *statut personnel*, ils jouissent de tous les droits de famille comme père, fils, et époux."

Appendix to Report, p. 117.

the French tribunals are competent to entertain suits between one foreigner and another, but they are not bound to do so.*

When a foreigner is plaintiff, he may be called upon to give the *cautio judicatum solvi.*

In case of bankruptcy, foreigners have the same rights as Frenchmen, with the exception that, a foreigner cannot have the benefit of a *cessio bonorum* to free himself from his debts, the reason for which is said to be that the liability to arrest in case of debt, to which a foreigner is subject, would be thereby superseded. Till the recent alteration of the law, foreigners were liable to be arrested on what would be called by us *mesne process;* but to this they are no longer exposed.

There are, however, still some incapacities under which foreigners labour; but of these the principal may perhaps be said to partake of a political character. Thus they are excluded from all public functions. They cannot be judges, or discharge any office or calling for which an oath of allegiance to the head of the State is required; for which reason they cannot be advocates, notaries, or avoués. They cannot act as arbitrators, as this, under the French system of "*arbitrage,*" would clothe them temporarily with the characters of judges. They cannot serve in the army, or in the

* The law as to the right of one foreigner to sue another in France, and whether the right does not extend to all causes of action arising in France, appears by no means settled. See note to Zachariæ, Droit Civil Français, Tome i. p. 87, n. 12, by the very learned editors Messrs. Massé et Vergé.

national guard, or serve on juries. They cannot be witnesses in certain authentic acts, as for instance, in notarial acts. Lastly, they cannot exercise the profession of physicians or surgeons, or the business of chemists, without a special authorization.*

By a law of the 3rd of December, 1849, a foreigner sojourning or residing in France, may at any time be expelled the country at the absolute discretion and pleasure of the Government.

What has been thus far said applies to the case of foreigners under ordinary circumstances; but there is a class of foreigners who, with very trifling exceptions, are relieved from the disabilities of foreigners in general. These are foreigners domiciled in France with the authorization of the Head of the State. By the 13th Article of the Code Civil,† a foreigner thus domiciled enjoys all civil rights; but only so long as he resides in France; being herein distinguished from the Frenchman, who of course carries the national character with him wherever he may go.

"Sauf les droits politiques," says Mons. Treitt, "l'étranger domicilié jouit des droits civils comme le regnicole; cependant comme il est toujours étranger, il ne peut être témoin dans certains actes authentiques, ni être arbitre, puisque l'arbitrage estune juridiction."

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* Report of Mons. Treitt to Lord Lyons of June 29, 1868. Appendix to Report, p. 117.

† According to Mons. Rogron, this provision was made in favour of strangers intending to become Frenchmen, during the period of residence required preliminary to naturalization. Code Civil, note to Art. 13.

"Le domicile acquis en France," he adds, "ne délie pas l'étranger des obligations que le statut personnel de son pays lui impose, ni de ses devoirs envers sa mère patrie."

The only other distinction to be noticed between the domiciled foreigner and the Frenchman is that, under the law of 1849, the former may at any time be expelled from the country at the discretion of the Government, even though the authority to reside may not have been revoked, which, however, it always may be, should this be deemed necessary.

The law of France on the subject of aliens has been dwelt upon at some length, partly because France was the first country to break through ancient prejudices in respect of foreigners, but more so because her example has been followed by other nations, especially by those who have framed their codes on the model of the Code Napoleon.

Belgium has followed, though somewhat tardily, the example of France. Till April 1865, foreigners were not entitled to hold landed property in Belgium. But by a law then passed they are in that respect placed on the same footing as Belgians. As to other civil rights, the Belgian code in all material particulars follows the French.* The same distinction exists between strangers in general and strangers domiciled with authorization from the king. The latter, except as to political rights, are admitted to a perfect equality with the Belgian citizen. The Government possesses the power of expelling a stranger not authorized to establish his domicile in

* Code Civil, Articles 10, 11.

the country, except in the case of one who has married a Belgian woman, and has had children by her born in Belgium during his residence there, or in the case of a foreigner having the decoration of the iron cross. But these exceptions cease to be of avail in case of war between the nation of the foreigner and Belgium.*

In Greece foreigners may become owners of immoveable property as well as of personalty; they can be owners of Greek vessels, but cannot act as captains or masters. They are precluded from the exercise of all public functions, and cannot be advocates or serve on juries. The tribunals of the country are open to them whether against a stranger or a Greek, even in respect of contracts made out of the country;† but when plaintiffs, they may be compelled to give security, except when they possess sufficient moveable property in the country, or when the cause of action arises out of matter of commerce, or, lastly, when there is some stipulation to the contrary in a treaty with the country of the foreigner.‡

By Article 26 of the Portuguese Code, all foreigners residing or travelling in Portugal possess the same rights and are subject to the same civil duties as Portuguese citizens, so far as regards any acts which are to be carried into effect in the country, except in cases in which either an express law or a special treaty shall provide otherwise.

* See Appendix to Report, p. 115—16.

† Code de procedure Civile, Article 28.

‡ Code de procedure Civile, Art. 78, 79. Appendix to Report 118—19.

But of the codes which have been framed on the model of the French, that of the new kingdom of Italy has best given effect to the principle of placing citizens and foreigners on the same footing in respect of civil rights. In one short sentence "the foreigner is admitted to all the civil rights of the citizen," unaccompanied by restriction, condition, or qualification. What a step in the march of civilisation, and towards the fraternity of nations! *

* "Lo straniero è ammesso a godere dei diritti civili attribuiti ai cittadini."—Codice Civile Italiano, Articolo 3.

If Italian unity had produced no other result than this admirable Code, which is in all respects a great improvement on the Code Napoleon, and which is strongly recommended to the attention of those who, in spite of the example and experience of so many other nations, persist in maintaining that codification is not a thing to be desired—Italian unity would have brought a great gain to the Italian people.

Monsieur Huc, in his highly esteemed work, "Le Code Civil Italien et le Code Napoléon," makes the following observations on the Article in question:—

"Le nouveau Code admet libéralement les étrangers à la jouissance de tous les droits civils attribués aux Italiens. La loi est rédigée à cet égard d'une manière générale et ne requiert aucune condition de domicile ni de réciprocité. On ne saurait assez louer cette disposition, qui est tout à fait en harmonie avec les tendances les plus légitimes de l'humanité. De plus, elle a pour effet de simplifier singulièrement la loi en lui ôtant l'embarras de choisir entre des systèmes divers dont aucun n'est satisfaisant. On sait toutes les difficultés qu' éprouvent les jurisconsultes pour établir quelle est, sur le point qui nous occupe, la véritable théorie du Code Napoléon. Cependant, d'aprés l'interprétration qui prévaut en général, on peut dire qu'il n'y a pas, en définitive, une bien grande différence entre l' étranger et le Français, surtout

The German States have not been backward in adopting the wiser and more liberal views of modern times in respect of the capacity of foreigners.

In Austria their rights are regulated by the 33rd section of the Code. According to this law foreigners enjoy the same civil rights as Austrian citizens, except where the qualifications of an Austrian citizen are expressly required. These exceptions relate only to offices and the exercise of professions and trades. Foreigners, not naturalized, cannot be public functionaries; they cannot be admitted to the military service, or be superiors of religious orders; they cannot be advocates, notaries or public agents, or sworn brokers; they cannot be appointed guardians or committees of Austrian minors or Austrian subjects

depuis la suppression récente de la contrainte par corps en matière civile. Nous n' hésitons pas à croire, en effet, que l' étranger est, en principe, admis à jouir en France des mêmes droits que le Français; qu'il est seulement privé des droits qu'une disposition spéciale lui retire, et que, même pour ces derniers droits, il en jouit, s 'il y a lieu d'appliquer la réciprocité diplomatique dont parle l' article II. Mais quelle difficulté pour arriver à la démonstration de cette solution, et combien la décision du Code Italien est plus libéral et plus sage !

Il était temps de voir enfin disparaitre des codes modernes ce principe déjà suranné de la réciprocité, conception paradoxale qui assigne à une nation comme règle de conduite, non pas l' idée de justice, mais l' adhésion douteuse d'une autre nation plus attardée dans la voie du progrés. Désormais, en Italie, l'étranger sera tout à fait assimilé à un Italien, sauf dans un cas unique prévu par l'article 788, aux termes duquel l'étranger qui ne réside pas dans le royaume ne pent figurer comme témoin instrumentaire dans un testament public."

under committee; they cannot be directors of public schools or educational establishments, or professors at a university or at any public institute. If a foreigner wishes to commence a public trade, a special concession from the Minister of the Interior is required.

In Prussia aliens are permitted to acquire both personal and real property. As participators in an inheritance they possess equal rights with natives. No deduction is made from an inheritance falling to an alien, unless the Government of the alien raises a like tax on inheritances accruing to aliens.*

With reference to the acquisition of property by aliens, the three following limitations are in force:—

1. Donations, inheritances, and legacies cannot be left to foreign corporations or public institutions without royal permission.† 2. Foreign corporations and other authorised persons, especially joint stock companies, are not permitted to acquire real property without royal permission.‡ 3. Estates and manor houses belonging to the nobility cannot be acquired by foreigners without the permission of the Minister of the Interior.§

Aliens enjoy all the rights of Prussian subjects in the carrying on of business duly authorized, whenever the respective foreign State has not, to the disadvantage of aliens generally, or of the Prussian

* Royal order of April 11th, 1822. Legal Code, p. 186.

† Law of May 13. Collection of Laws, p. 49.

‡ Law of May 4, 1846. Collection of Laws, p. 235.

§ Royal Decree of March 28, 1809.

State in particular, imposed burdensome regulations, in which case retorsion may occur. Nevertheless, to the general right to carry on business there are the following exceptions:—

1. By a law of Oct. 28, 1867, the right of owners of mercantile ships to hoist the flag of the North German Confederation is confined to those foreigners who are naturalized; 2. by a law of May 14, 1853, aliens must obtain permission of the minister in order to carry on in Prussia insurances and emigration undertakings through agents;* 3. foreign agents, in the absence of an international treaty, can only carry on a permanent trade with the permission of the Minister of Commerce.

In civil suits, aliens have the same rights as natives in asserting their private claims as plaintiffs before the courts of justice. But according to the regulations of the general statute respecting tribunals, natives as well as aliens are bound to give security to the defendants in cases where the matter cannot be at once settled. In a suit with a foreigner, the defendant can only refuse to go into court, or to allow the suit to continue, if the plaintiff cannot find security. An alien can only obtain the arrest of another alien when the summons has reference to a contract concluded or to be carried out in the country; or when the debtor in the deed by virtue of which the arrest is sought has made himself liable either to payment, or to arrest in any place; or when the summons originates in a bill of exchange which has

* Collection of Laws, p. 293.

fallen due, and the drawer is a merchant who visits the fairs and markets of this country.*

In Bavaria, the general rule is that a foreigner enjoys equal civil rights with a native of the country, save only where an exception is made by legal enactment, or when a royal ordinance applies the principle of retaliation on account of disadvantages to which Bavarian subjects are liable abroad, as compared with persons belonging to the country which imposes such disadvantages. The capacity to acquire real property is conditioned on reciprocity in the country of the foreigner.

The Trade Law of the 18th of January 1868 reserves the sanction of the State for foreign joint-stock companies, branch establishments, and other companies established for trading purposes, so far as the provisions of State treaties do not determine otherwise. Foreign medical men receive from the provincial governments or from the Minister of State for the Interior the permission to practise in the country. Medical men who are only staying temporarily in Bavaria, and who are entitled to practise in their own country only, have the right of giving consultations, but not that of ordinary practice.†

* See Despatch of Baron Thile to Lord A. Loftus, of Oct. 7, 1868, containing a summary of the privileges applicable to foreigners as regards their legal status in the Prussian territory, with reference to the various laws. Appendix to Report, p. 124 and seq.

† § 15, Ordinance of the 29th of January, 1865, concerning the medical art.

Article 10, of the military law of the 30th of January of this year prohibits the permanent residence in the kingdom, as foreigners, of emigrants who have not yet attained their 32nd year.

Foreigners are permitted to reside in any commune of the kingdom when they can bring sufficient proof of their nationality and place of legal settlement, and when there is no legal impediment to their residence. The expulsion of a foreigner from a commune is only admissible on the same legal grounds as would justify the expulsion of a Bavarian subject not having a right of settlement in the locality.* The Minister of the Interior is empowered to expel a foreigner from the country on grounds connected with the internal or external security of the State.†

The law of Saxony as to the right to hold real property is peculiar, and apparently based on no very sound or intelligible principle. Every foreigner, who desires to become possessed of landed property in town or country, *with personal residence*, must first be naturalized; but naturalization is not required— 1, for such as hold landed property in Saxony on which they are not domiciled and which is under foreign management; 2, for foreigners who acquire landed property in Saxony with habitual residence but who usually reside abroad, so long as they con-

* Article 45 of the Law of Settlement of the 16th April of this year.

† Dispatch of Prince Hohenlohe to Sir Henry Howard of July 5, 1868. Appendix to Report, p. 114.

tinue abroad; 3, when a wholesale business or manufacture is established in the country by a foreigner residing abroad. In the two latter cases there is a condition that the obligations of citizenship which attach to a property or undertaking shall be fulfilled by a proper native representative.

And in all these cases foreigners participate in the privileges and duties of a Saxon subject only so far as the nature of their property or trade may admit or may be sanctioned by the law.*

In Wurtemberg the law is based on the principle of reciprocity. From a despatch from Mr. Gordon to Lord Stanley, of the 24th of June, 1868, it appears that—

"The Wurtemberg Legislation on this subject is extremely liberal and is based entirely on reciprocity. An alien establishing himself in the country can claim by law every advantage and liberty possessed by a Wurtemberg subject desirous of settling himself in a commune to which by birth he does not belong, if a similar liberty be granted to Wurtemberg subjects in the country of the alien. In the contrary case the law reserves to the authorities the right of refusing to aliens privileges which would not be enjoyed by Wurtembergers in the foreign country in question, but the exercise of this right by the authorities is very seldom practised, and would be so only under special circumstances.

"In the case of an alien purposing to practise any trade or industry in Wurtemberg all that is required is that he shall establish his nationality and furnish proof, if called upon to

* Code Civil, art. 10. Appendix to Report, p. 129.

do so, (and this last does not often occur), of the right of Wurtembergers to do the like in the alien's own country."*

The law of Baden, with respect to the rights of foreigners, is stated in the following written communication from Count Freydorf to the British legation at Stuttgart.†

"Within the whole compass of private rights, especially in respect to the right of acquiring and possessing property of every kind, landed property included, aliens stand according to Baden law upon a footing of complete equality with native subjects.

"As regards the right of settlement and of engaging in trade or industry, the Baden Government are entitled, if they please, to demand reciprocity as the condition of admission to such rights. They have, however, never as yet taken any advantage of their authority in this respect, so that in point of fact aliens residing in Baden are subject to no disabilities in regard to the right of settlement, or of engaging in trade or industry.

"On the other hand, aliens are of course excluded from political rights, from offices in Church and State, and from such rights as appertain to persons as members of a corporate community."

Practically, therefore, as regards civil rights, aliens in Baden are subject to no disabilities whatsoever.

From a communication from Count Frijs to Sir Charles Wyke, it appears that as regards private rights, foreigners domiciled in Denmark are in precisely the same condition as native subjects.‡

* Appendix to Report, p. 136.

† Appendix to Report, p. 114.

‡ Appendix to Report, p. 116.

The legislation of the Netherlands is less satisfactory, the right of foreigners being based on the uncertain criterion of reciprocity. Foreigners are indeed assimilated to native subjects generally, but by the 884th and 957th articles of the Code Civil, they can only succeed either by testament, or *ab intestato*, or acquire by donation, where by the law of the country of the foreigner the same rights are secured to the subject of the Netherlands.

The law is, however, favourable to foreigners with regard to admissibility to public employment, a long list of offices being specified in which they are capable of being employed.*

Here, also, a distinction is made between foreigners who are domiciled and those who are not. With regard to the latter the law of procedure is harsh. Aliens not domiciled within the Netherlands are liable to imprisonment for debt for any debt contracted with a Netherlands subject.† They may, without sentence in a court of justice, be seized for debts due to a Netherlands subject on an order of the justices of the arrondissement.‡ They are liable to seizure for debt, if payment of a debt on application is not made within eight days. Bail, however, or security for debt and costs will be accepted.§ When not domiciled they are excluded from participating in the advantages of a *cessio bonorum*.‖

Domiciled aliens are not subject to these disad-

* Law of June 4, 1858, Appendix to Report, p. 123.

† Code of Civ. Proceed. § 585.

‡ Ib. § 768. § Ib. § 769-770. ‖ Ib. 710.

vantages, being assimilated in respect of civil matters to the native subject.

Aliens are considered to be domiciled, and are assimilated to natives—when, by virtue of permission from the King, they have established their domicile in the kingdom, and have made the communal administration acquainted with such permission; and when, after having established their domicile in a commune of the kingdom, and retained it in the same commune for six years, they have announced to the communal administration their intention to settle in the kingdom.* Besides these two classes those aliens also are admitted to Netherlands citizenship who are domiciled within the kingdom having married Netherlands women, or who having married Netherlands women have had issue by them born within the kingdom.†

In Russia the position of foreigners has been greatly improved by recent legislation. From the statement of Mr. Roebuck, the consulting advocate of the British Empire at St. Petersbugh,‡ it appears that several of the restrictions which existed in Russia with regard to the rights allowed to foreigners have, since 1860, been abolished, and their rights greatly extended.

They can now hold landed property as well as personal, and as landholders are eligible to be mem-

* Code Civil, § 8.

† Law of August 13, 1849, § 19. Appendix to Report, p. 123.

‡ Appendix to Report, p. 128.

bers of the rural provincial assemblies. They are allowed to trade without being naturalized. They may hold commissions in the Russian army, and take the several ranks in it, and having the rank of Lieutenant General or full General, or of Field Marshal, may be appointed Senators and members of the Council of the Empire.

But they cannot hold the offices of judge, magistrate, or justice of the peace; they cannot be advocates, or serve on juries. They are not allowed to enter the civil service, though an exception is herein made in favour of professional and scientific men, such as physicians, surgeons, apothecaries, architects, engineers, and professors and teachers of the arts and sciences.

Lastly, foreigners cannot acquire the right of hereditary nobility.

The law of Sweden as to aliens is based on the principle of reciprocity. Foreigners belonging to countries in which Swedish subjects are entitled to inherit property possess the same right in Sweden, so that they may thus become the holders of real and personal estate in this kingdom.* In the absence of such reciprocity, foreigners may not hold real and personal estate without the special permission of the King; but there appears to be no legal hindrance to their possessing the usufruct of real and personal estate on lease or otherwise.†

Offices of trust under the Government can, as a

* Statute of Inheritance (Arfda Balken), ch. 15, § 2.

† Royal Proclamation of 3rd Oct. 1829.

rule, be filled only by natural-born Swedish men. But foreigners may be appointed professors or teachers at the Universities, with the exception of posts for theological instruction, or as teachers, or in any other capacity, at other scientific, industrial, and artistic institutions, and also to the medical profession. They may be appointed to military posts, except the command of a fortress.*

Foreigners are permitted to be part owners of vessels registered either for home or foreign trade; but they may not possess more than one-third of the tonnage of Swedish vessels, or be the managing owners. Those who have obtained the permission of the King to dwell in the kingdom may also, after special inquiry in each case, obtain permission to exercise trade, manufactures, mechanical employments, or any other calling.†

In Norway foreigners are, in substance, placed, in respect of civil rights, on the same footing as Norwegians.‡

If we turn to America, though aliens were originally subject to the disabilities of the common law, we shall find that, so far as the law concerning the rights of aliens is within the authority of the Federal Legislature, the modern view of the subject has prevailed. By recent Acts of Congress, public lands may be purchased by aliens, though they can be granted

* Regerings Formen, § 28.

† Royal Statute of 18th June, 1864. App. to Rep. p. 130.

‡ St. Joseph, Concordance, vol. iii. p. 4, § 6.

gratuitously to citizens only, or to aliens who have declared their intention to become such. Aliens have also been made capable of taking out patents for inventions on the same terms as native citizens.

But as regards shipping, no vessel is entitled to be registered as a vessel of the United States, or to have any privilege as such, unless wholly owned by citizens of the United States, and commanded by a citizen.

The right of aliens to hold lands, other than public land belonging to the Union, being, as is always the case with regard to realty, part of the *lex loci rei sitæ*, depends on the law of the State in which the land is situate; and as each individual State has its own legislature and its own municipal law, considerable variety of legislation in respect of the right of aliens to hold real estate has been the result.*

In fourteen States of the Union, namely, the district of Columbia, Florida, Illinois, Iowa, Kansas, Maine, Massachusets, Minnesota, Nebrasca, New Hampshire, New Jersey, Ohio, Oregon, and Wisconsin, the common law as to the disability of aliens to hold landed property has been abrogated, and no distinction any longer exists between them and native citizens.

In Pennsylvania, the capacity of an alien to acquire landed property is limited to 5000 acres.

In Louisiana, the common law does not prevail, and there appears to be no incapacity in aliens to require real estate. In the case of Phillips

* See Appendix to Report, p. 132-136.

v. Rogers the supreme Court of Louisiana awarded to the plaintiff, an alien, residing in Ireland, the whole estate real and personal of his deceased brother, a resident in that state.*

In six States, Connecticut, Kentucky, Michigan, Nevada, Virginia, and West Virginia, while aliens are not prohibited from acquiring and holding landed property, *bonâ fide* residence is made the condition of their capacity.† In California, the mode of acquiring is limited to inheritance, but a period of five years is allowed before the rule as to residence comes into force. If at the end of five years the party has not come to reside, the estate is to be sold by the State for the benefit of the alien or his legal representatives.

Ten States, Arkansas, Delaware, Maryland, Missouri, New York, Rhode Island, South Carolina, Tennessee, Texas, and Virginia, concede the right only to resident aliens who have declared their intention to become citizens of the United States, as required for the purpose of being naturalized.

The States of Texas, and Tennessee, however, adopt the principle of reciprocity also, and, independently of residence, allow an alien to acquire and hold real estate where by the law of, or treaty with, the country of the alien, a similar advantage is allowed to American citizens.

Missouri allows aliens acquiring real estate by

* 5 Marten Rep. 752.

† Nevertheless, in Connecticut, a non-resident alien is allowed to acquire real estate for the purpose of mining or quarrying.

descent or devise, and who are incapable of holding the same by reason of being aliens, to sell or convey it within three years from the settlement of the affairs of the deceased.*

In our own colonies great difference of legislation exists. In a few of them the local legislatures have outstripped that of the Mother country in adopting a liberal policy. In Canada and Nova Scotia, in British Columbia, and at the Cape of Good Hope, in Victoria, Nevis, St. Kitts, by recent statutes, aliens have the same power of acquiring, holding and devising lands as natural born subjects. In India, legislation is going on in the same direction. In Bengal all restrictions on foreigners as to holding lands were done away with by an Act of 1868; and it is understood that the Governments of Madras and Bombay have similar Bills under consideration.†

In New South Wales, Queensland, New Zealand, Bermuda, the Bahamas, Jamaica, Barbadoes, and Honduras, aliens are by local statutes placed on the same footing as aliens in Great Britain; that is they are enabled to take landed property on lease for 21 years.

In other Colonies naturalization in each individual case is necessary to enable an alien to hold lands.

* In Oregon and Texas the privilege granted to aliens is expressly limited to *white* aliens.

† Appendix to Report, p. 139.

CHAPTER VI.

AMENDMENT OF THE LAW.

SECTION 1. *As to Rights of Aliens.*

ON proceeding to consider the alterations which are called for under present circumstances and in the existing relations between nations, the first question which it will be desirable to dispose of, with a view to clear the ground for the consideration of the important subject of naturalization, is that which relates to the removal of the disability of aliens.

We have seen that Great Britain stands almost alone in maintaining the incapacity of aliens to hold real estate. So many enlightened nations having done away with the restraints upon the stranger, which idle fears and an illiberal jealousy suggested in a less enlightened age, ought this country to hesitate to follow their example?

The reasons given for this law by Lord Coke in Calvin's case* are conceived in the narrow spirit of exclusion before referred to, and while they can hardly fail to provoke a smile, may serve as an example of the curious reasoning with which our antient sages sometimes satisfied themselves in expounding the law. "The reasons," he says, "wherefore an alien-born is not capable of inheritance within England are three:

* 7 Co. Rep. p. 17.

"1. The secrets of the realm might thereby be discovered. 2. The revenues of the realm (the sinews of war, and ornament of peace), should be taken and enjoyed by strangers born. 3. It should tend to the destruction of the realm. Which three reasons do appear in the Statute of 2 H. 5 cap. and 4 H. 5, cap. ultimo.

"But it may be demanded, wherein doth that destruction consist; whereunto it is answered: first, it tends to destruction *tempore belli;* for then strangers might fortify themselves in the heart of the realm, and be ready to set fire on the commonwealth, as was excellently shadowed by the Trojan horse in Virgil's second book of his Æneid, where a few men in the heart of the city did more mischief in a few hours, than ten thousand men without the walls in ten years.

"Secondly, *tempore pacis,* for so might many aliens born get a great part of the inheritance and freehold of the realm, whereof there should follow a failure of justice (the supporter of the commonwealth) for that aliens born cannot be returned of juries for the trial of issues between the king and the subject, or between subject and subject."

Blackstone, who, however great may be his merits, is ever ready, it must be acknowledged, with an apology for a bad law, says, in justification of this:—

"If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the King of England; which would probably be inconsistent with that which he owes to his liege lord; besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore, by the civil law such contracts were also made void; but the prince had no such advantage of forfeiture thereby, as with us in England. Among other reasons

which might be given for our constitution, it seems to be intended for *the alien's presumption in attempting to acquire any landed property;* for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange."*

It must be admitted that the reasons thus given are of a most shadowy and unsatisfactory character, and such as altogether fail to justify the law. No one can seriously believe that foreigners would ever acquire real property in this country in such numbers as to endanger the safety of the State, or to interfere with the administration of justice by lessening the number of persons qualified to act as jurymen. Landed property would still continue to contribute to the burdens of the State, though in the hands of foreigners.

All that would happen would be that individual foreigners, settling in this country for the purpose of trade or residence, or on marriage, or to whom landed estate might devolve by inheritance, would not be under the necessity of procuring themselves to be naturalized in order to be capable of acquiring realty.

If it be asked what advantage is to be gained by thus assimilating foreigners to natural born subjects, the answer is that looking to the present state of the traffic and intercourse of nations, the frequency of marriages between foreigners and natives, and the claims to property and other rights thence arising, it is for the common convenience that by the common under-

* 1 Com. 372.

standing and comity of nations, the inhabitants of each particular State shall enjoy, in other countries, in respect of civil rights, the same advantages as the native, without the necessity of sacrificing their nationality to obtain them; and that even in time of war the rights thus conceded to the alien shall be respected.

The recommendation of Her Majesty's Commissioners "that the present disabilities of alienage, in respect of the holding and inheritance of land, shall be abolished altogether," will, therefore, it is hoped, be readily assented to. The Commissioners add: "It has been suggested that, in time of war, danger might occasionally arise from the possession of land by aliens. We think it sufficient to say that this is a danger against which, should it be deemed serious enough to demand special legislation,"—the Commissioners do well to put this doubtingly—"it would not be difficult to guard."*

The report of the Commissioners appears to assume that the removal of the incapacity to hold land is the sole motive with aliens for seeking to become naturalized. It does not notice another, and perhaps still more important, head of the incapacity of aliens, namely, that of being unable to own British ships.† Should the law in this respect be relaxed? The answer will be readily in the negative, so far as aliens in general are concerned. An alien who owes no allegiance to the State, and who, when on the seas, is no longer amenable to our laws, can have no

* Report, p. 7.

† See ante, p. 149.

claim to the protection of the British flag, in respect of a species of property, which, unlike real estate, may, at any moment, be withdrawn from British dominion altogether. But whether a foreigner settled and domiciled in this country, under circumstances which would entitle him, according to the usual course, to a certificate of naturalization, might not be permitted to be an owner of British shipping, so as to supersede the necessity of a naturalization which, in reality, gives no British nationality, is another, and a very different question.

By the 18th section of the Merchant Shipping Act,* persons made denizens or naturalized can only be owners of British shipping, provided that during the whole period of their being so, they are and continue to be resident in some place within Her Majesty's dominions, or, if not so resident, members of a British factory, or partners in a house actually carrying on business in the United Kingdom or some other place within Her Majesty's dominions, and have taken the oath of allegiance to Her Majesty.

The condition of continued residence, or of being a member of a British factory, or of a firm established within the British dominions, thus required in addition to naturalization, affords a material security for the naturalized owner continuing within the jurisdiction of the State and remaining amenable to its authority. With this security, naturalization it is submitted might well be dispensed with, seeing that it now becomes inoperative as soon as residence

* 17 and 18 Vic. c. 134.

ceases; or, if any further security were required, a license from the Board of Trade, after satisfactory proof that the foreigner was *bonâ fide* settled in the country, might be required as a condition of the right.

If aliens were under such circumstances enabled to own British shipping, as well as to hold real property, all further necessity for naturalization, except with the object of a change of nationality would cease to exist.

It has been shewn that, in dealing with the capacity of aliens, many countries have based the concession of civil rights to the subjects of other nations on the condition of reciprocity. But the principle is an unsound one, as it proceeds on the notion that, in conceding civil rights to foreigners, a nation derives no advantage except such as accrues to its own subjects from the capacity for civil rights in other countries. But the foreigner who brings capital, industry, or intelligence into the country, gives good consideration for the benefit he receives. He adds a useful and profitable member to the social, though not to the political community. Her Majesty's Commissioners have, therefore, done wisely in recommending that an alien shall enjoy the same civil rights as the subject, without any reference to a corresponding provision in his own country.*

* Some countries have contented themselves with simply granting, in general terms, the same rights to aliens as their subjects enjoy in the countries of such aliens. But an enactment couched in such general terms is inexpedient, as if it be met by a similar law on the part of another nation, no practical result is obtained. The two negatives fail to make an affirmative.

SECTION 2. *As to double Nationality.*

We have seen the inconvenience and embarrassment which may arise—more especially in case of war—from a twofold nationality, in giving rise to conflicting claims to the allegiance of the same individual, or to inconvenient claims of protection. And we have seen that such twofold nationality arises, either from a conflict of laws relating to nationality of origin, whereby an individual becomes the subject of two states at once, or from an acquired nationality being added to, without doing away with, that of origin.

Ought, then, this twofold source of nationality to be left? The question appears to answer itself. No man can satisfy a double claim on his allegiance made by two nations which are in conflict. So long as the two nations are at peace, the man of two nations, by obeying the laws of the country in which he happens to be, may find himself involved in no difficulty. Yet the contrary may happen. Take first the nationality of origin. An individual being in fact a subject of State A, and conceiving himself to be so, but residing for purposes of business in State B, finds himself called upon to discharge duties, or bear burdens, incidental to the character of a subject of the latter. He claims exemption as a subject of State A., and calls on the Government of A to protect him. He is told in answer that he is a subject of both States, and that though, if in the territory of A, he would be treated as the subject of A, yet having placed him-

self within the jurisdiction and power of B, however he may have deluded himself with the notion of being a subject of A and under the ægis of its protection, he is quite as much a subject of B, and must fight the battles and contribute to the burdens of the latter.

But what if—as in the case already put—war should take place between the two nations? To which is he to adhere? Which allegiance is to prevail? Is this, again, to depend on whether State A or State B happens to have him within the grasp of its authority? It should be remembered that allegiance is matter of solemn obligation; and that so long as a man is clothed with a given nationality, allegiance to the State, in the person of its ruler or government, is matter not of option but of duty, and, what is of by no means indifferent, that the breach of such duty may involve a man in no small danger.

It may be said, indeed, that no civilized country would think, now-a-days, of holding a man responsible as a traitor to his allegiance, for being found in arms in the service of a country in which he was settled and to which he honestly believed himself to belong. Such an application of the law of treason would obviously be so cruel and unjust, that, probably no government would be disposed to enforce it in such a case, or even if so disposed, would incur the odium of such a proceeding; to say nothing of the danger of provoking reprisals on its own prisoners. It is probable, that no government would think, in our days, of putting a man circumstanced like Æneas Macdonald on his trial. But the fact

that conflicting laws relating to nationality and allegiance can in the present state of things no longer be applied, and that in a case of divided allegiance, the question now must be to what State the individual belongs—not theoretically and in contemplation of law, but practically and in reality—is in itself a very cogent reason for placing the law, not only of this country, but, if possible, the law of nations also, on a uniform and more enlightened footing. And even though it may be true that no Government in these times would enforce the law of treason against a man, who, owing a double allegiance, had attached himself to one country exclusively, yet, as has been before pointed out, cases may well be imagined in which a man's connections and intercourse with both countries might have been so equally divided as to expose him to be deemed a traitor to the one against which he might be found serving.

The same observations apply to a double nationality arising from naturalization in a second country, when that of the country of origin continues, though here, no doubt, it may be said that it is the fault of the person himself who has voluntarily placed himself in this position of difficulty.

But there is another and a still more important point of view in which the question must be looked at, and in which it is indifferent whether the double nationality arises from origin or from naturalization. The matter must be looked at not only with reference to the interests of individuals, who may find themselves in the embarrassing position of having to choose between two masters, each of whom may hold

out the penalties of treason as the alternative of obedience, but also with reference to the interest of the State. It must be remembered that the obligations of sovereign and subject, of state and citizen, are reciprocal, and that, where the one owes allegiance, the other owes protection. And though it may be true that practically an individual subject may have no means of enforcing this right against the State, yet no government can be wanting in the discharge of this obligation, and fail to afford protection, according to its ability and means, to a subject suffering a wrong at the hands of a foreign power, and thus disappoint just and legitimate expectations, without seriously compromising its own character and dignity. It is therefore manifestly the interest of every government not to be exposed to having its protection claimed, and to becoming involved in disputes with other powers, on behalf of persons, who, though nominally and in contemplation of law its subjects, are but unprofitable subjects, being in fact settled elsewhere, and contributing nothing to its wealth or strength. It is equally to its interest not to be compelled to refuse protection to undoubted subjects lest by interfering in their behalf it should do violence to the rights of other powers. That governments may be exposed to claims of this sort, and that embarrassment may ensue therefrom, experience has abundantly shewn. Nor has the course taken on such occasions, in order to avoid collision with other powers, always been, as we have seen, of a character altogether dignified or satisfactory.

It is obvious that the evil would be remedied if, by a law common to all nations, the rule as to nationality of origin were everywhere the same, and naturalization by a second country had the effect of superseding the allegiance due to that of birth. It seems, then, impossible to doubt that it would be for the common advantage of governments and subjects if a uniform rule were everywhere adopted. But then what should that rule be? And, first as to nationality of origin. Should descent or place of birth be the determining cause? The nations of Continental Europe have decided in favour of descent. "Nationality," says Dr. Bar, in his profound and learned work on International Law, "is by the law of all nations"—he should have excepted that of this country—"primarily dependant on descent. Almost everywhere the nationality of the parent decides without reference to the place of birth; and this must be acknowledged to be the right rule, seeing that *nationality essentially springs from descent.*"*

Everything no doubt turns on the position that nationality springs from descent—which may perhaps be best tested by the question, whether, if the nationality of a child born in a different country from that of his father were not determined by positive law, and it were left to his own choice to select the country to which he should belong, he would prefer the country of his father or that of his place of birth. It can not be doubted that, in the vast majority of instances, he would select that of the father. And the reason is obvious. Personal attachments are stronger than

* Bar, Internationales Privat und Strafrecht, p. 91, § 32.

local ones. The place of birth is an accident; the associations connected with it are fleeting and uncertain; while the domestic ties and the relations of family and kindred are powerful and enduring. The child, as soon as he can think and feel on the subject, learns to associate the idea of his own nationality with that of his father. It would be a source of pain to him to be told that by reason of having been born in another country he was to be of a different nation from his father. The impression thus produced in early youth remains, and strengthening with advancing years develops itself into the national attachment which we designate by the term of patriotism.

Descent, therefore, affords the true rule for determining nationality. This being so, it is obvious, that in adapting our law to this principle, there would be the two-fold advantage, first, that we should be placing the law on the right foundation, secondly, that we should accomplish the all-important object of bringing it into unison with the law of other countries; a result which cannot otherwise be obtained, inasmuch as it would be at once idle and presumptuous to propose to other nations to adopt a false principle in order to adapt their law to ours.

To the general rule that nationality should spring from descent there should however, by general agreement, be two exceptions. There are cases where, the father having settled and become domiciled in a foreign country, the child has been born and brought up in it, and purposing to remain in it permanently—all his associations and expectations being centered there—has learned to consider himself

as belonging to the country of his birth. It may be well to enable a person under such circumstances to claim citizenship in the country of birth.

Again, where for two generations the ancestors of a person have been domiciled in a foreign country, an opposite presumption may fairly be made to that which arises in the first generation, and it may be assumed, in the absence of a positive declaration to the contrary, that the descendant of the foreigner has become so identified with the country of birth as to prefer its citizenship to that of his forefathers. He may therefore be treated as belonging to the country of birth, subject however to his being at liberty to elect to belong to the former, and declaring accordingly within a given time, as is provided by the law of France and other countries which have followed the French code.

But it is plain that to make these exceptions work harmoniously, there should be, what in the present state of international law does not exist, an understanding among nations—and effect should be given to this understanding by law—that, on the election of the country of birth in the one case, and on the absence of the rejection of it in the other, the nationality by descent should entirely cease. Without such an understanding, there must necessarily be a conflict of jurisdiction between the country of descent and the country of birth. The exceptions to the general law should therefore be based on reciprocity in the country of the parents; and where no such reciprocity exists, as would be the case, for instance, with

Austria or Prussia, the exception ought not to be allowed.

If the views thus propounded as to the principles on which the law relating to the nationality of origin and the exceptions to it should be founded are right, the recommendations of Her Majesty's Commissioners are certainly open to considerable exception.

The Commissioners propose in the first place that—

"All persons born within the dominions of the Crown should be regarded by British law as British subjects by birth, except children born of alien fathers and registered as aliens.

"That provision should be made for enabling children, born within the dominions of the Crown, of alien fathers, to be registered as aliens; and children so registered should be thenceforth regarded as aliens. The child, if not so registered on his birth or during his minority by his father or guardian, should be permitted to register himself as an alien at any time before he has exercised or claimed any right or privilege as a British subject."

In other words birth within the British dominions, irrespective of parentage, is still to constitute a British subject; with a reservation, however, in the case of the child of an alien parent, of a right of the parent to register the child as an alien, and of the right of the child to reject the character of a British subject within a year after attaining majority by a like registration — thus reversing the rule of the foreign law which makes it incumbent on the child of the foreigner to claim nationality. To a limited extent, no doubt, the proposed alteration would be an improvement on the present law, inasmuch

as it would enable a person who did not wish to be a British subject to divest himself of that character. But practically the result would be to perpetuate the present law with all its attendant confusion. As is pointed out by Mr. Vernon Harcourt, in many instances the foreigner would omit, from inattention or indifference, especially if he quitted the country at an early age, to take the necessary steps to avoid becoming a British subject. But a still more serious objection is to be found in the conflict with the law of other countries which must arise from permitting British nationality to follow on birth within British dominions, a conflict which it is agreed on all hands that it is desirable if possible to remove.

And, with all possible respect for the distinguished persons of whom the Commission was composed be it said, the reasons assigned by them appear anything but conclusive. The following is the language of the Report:—

"The rule which impresses on persons born within Your Majesty's dominions the character of British subjects is open to some theoretical and some practical objections, of the force of which we are aware. But it has, on the other hand, solid advantages. It selects as the test a fact readily proveable; and this, in questions of nationality and allegiance, is a point of material consequence. It prevents troublesome questions in cases, (numerous in some parts of the British empire,) where the father's nationality is uncertain; and it has the effect of obliterating speedily and effectually disabilities of race, the existence of which within any community is generally an evil, though to some extent a necessary evil. Lastly, we believe that of the children of foreign parents,

born within the dominions of the Crown, a large majority would, if they were called upon to choose, elect British nationality. The balance of convenience, therefore, is in favour of treating them as British subjects unless they disclaim that character, rather than of treating them as aliens unless they claim it. The former course is, of the two, the less likely to inflict needless trouble and disappoint natural expectations."

Of the four grounds thus given, the first and last, it is apprehended, are alone applicable to this country. With regard to the second and third grounds, namely, that the present rule with respect to the place of birth "prevents troublesome questions in cases, numerous in some parts of the British empire, where the father's nationality is uncertain," and "has the effect of obliterating speedily and effectually disabilities of race"—as the Report affords no explanation of what is hereby meant, or what class of fathers are referred to as being of an "uncertain nationality," or what are the "disabilities" of race which are to be got rid of, it is difficult to appreciate the force of the argument. But, if it may be assumed that these grounds have no reference to our relations with foreign countries, and are only applicable to some particular portions of Her Majesty's dominions, the answer would appear to be that the advantages referred to might be attained by special legislation, without interfering with the adoption of a rule which would be convenient here and which would remove the conflict of law existing between this and other nations.

The first ground assigned by the Commissioners, namely, the readiness of proof arising from taking the place of birth as the test of nationality, is no doubt

entitled to some weight. But the advantage cannot, surely, be such as to outweigh that of removing the existing conflict of laws and the confusion arising from it, and of bringing our own law into harmony with that of other nations. Other countries have not so deemed, nor do they appear to have found any practical inconvenience from the adoption of a different rule.

The last ground taken by the Commissioners, namely, that the majority of children born of aliens in this country would prefer to be British subjects, to the exclusion of the nationality of their parents, is a gratuitous assumption, as to which, no proof of the assertion being offered, a contrary opinion may without presumption be entertained. It is more probable, as is asserted by Mr. Harcourt, that such a rule would rather have the effect of imposing the quality of British subjects on a number of persons who neither seek nor desire it. But even if the fact were as assumed, where would be the hardship of calling upon such persons, at all events for the first generation, to declare, as is required by the Continental law, their election to become British subjects on attaining their majority? Ought the trifling inconvenience which would thus be occasioned to be put in competition with the object which the Commissioners themselves profess a desire to promote, that of doing away with double nationality? Moreover, as is observed by two of the Commissioners, Baron Bramwell and Mr. Bernard, such a law is inconsistent in principle with the recommendation that the child born abroad of a British father should be regarded by British law as a British subject.

The recommendation of the Commissioners is the more open to objection that it does not even make the domicile of the alien parent a condition of the British nationality of the child. A merely casual birth in the country is to have the effect of conferring the character of a British subject. A person thus born within British territory might leave the country at an early age, and claim at any time the rights and privileges of a subject. It is a fact worthy of note that, strict as is our law with reference to the ownership of British shipping, a person born in England of alien parents, or one born of British parents in a country where birth gives a right of citizenship, though domiciled in the foreign country, may, if he happens never to have had occasion to take an oath of allegiance to a foreign power, be an owner of British ships, and sail under, and be entitled to, the protection of the British flag.

As two of the Commissioners, Baron Bramwell and Mr. Bernard, well observe:—

"None of the duties of a British subject could practically be enforced against a person who, though born here, had always resided in the foreign country to which his father belonged. He could not, if he happened to be here, be justly made amenable to any duties other than such as the law imposes on all foreigners. But he would, nevertheless, possess the common rights of a subject, without having any real title to them. He might renounce indeed, if he pleased, his British allegiance. But why should he renounce that which might be a benefit to him and could not be a burthen? If, on the other hand, he were regarded as alien by birth, he could (provided he were resident here) obtain the advantages of British nationality by undertaking its obligations."

Mr. Vernon Harcourt, also a dissentient from the views of the majority of the Commission on this point argues powerfully as follows:—

"If it is desirable to recast the doctrine of nationality by such extensive changes as those proposed in the Report, it seems expedient to found the whole system on some intelligible and self-consistent principle. It would be difficult to suggest any reason for adopting the rule by which the nationality of the father determines that of the child in the case of the children born of British fathers abroad, which does not equally apply to the case of the children born of foreign fathers in England; and to lay down an opposite rule in the two cases seems not only indefensible in principle, but to be a course which, in respect of policy, is very likely to be misunderstood by foreign governments. If, whilst we assert that the child born of an Englishman abroad is a British subject, we also claim that the child born of a foreigner in England is likewise a British subject, it will be thought that acting for our own advantage on inconsistent principles we are grasping at the combined chances of a double event.

"It seems very desirable, as is stated in Section VII. of the Report, to lay down some rule in which all or most States are likely to agree. Now the rule of determining the nationality of the child *primâ facie* by that of the father is adopted by all States as regards the children born of their own subjects abroad. As regards the children of foreigners born in the realm, it is adopted by all States except England and America. It is obvious, therefore, that this is the rule by the adoption of which will be most readily obtained that consent of nations which on such a subject is of capital importance. It is stated in Section VII. of the Report that 'we have endeavoured to diminish the number of cases in 'which one who by British law is a British subject is re-'garded by foreign law as a foreign subject, and to obviate

'as far as possible the difficulties and inconveniences arising 'from a double allegiance.' In that object I entirely concur; but it seems to me that it is not accomplished but rather defeated by laying down the rule that the child born of a foreigner in England is *primâ facie* a British subject.

"By this rule persons are clothed with the character of British subjects, and become entitled to all its benefits, who have no real connexion with the community, and who ought to have no claims upon it. It is not probable that any foreigner accidentally resident in this country would disclaim the citizenship for his child which the law would confer, for the simple reason that the child would be enabled to take all the benefits, but could in no case be really made to fulfil the obligations of a British subject. Under this rule the child of a foreigner born here might return to his own country in his infancy, and he would thereafter possess, whenever he chose to claim them, not only for himself, but (since he is a natural-born British subject) for his children also, all the benefits of the character of a British subject, whilst it is abundantly clear that neither he nor his children could ever be called upon to perform any of its duties. This is the practical mischief of the present rule, and to re-enact it would be to give fresh authority to a principle the inconvenience of which is sufficiently apparent. Nothing can be more politically inexpedient than that this country should be exposed to the claims of a class of persons who have no interest in its welfare, and who, neither by origin or domicil, have any community with its affairs. On the other hand, in the case of foreigners and their children who really desire to incorporate themselves and their interests in the common stock of this country, and to embark their fortunes with ours, there seems neither hardship nor inconvenience in requiring that they should evidence their intention to change their nationality and adopt a new domicil by some formal act which, whilst it would establish their British

nationality, would at the same time terminate their foreign allegiance."

Nothing more seems to be needed to show that, whether with reference to principle, or to the important object of establishing a uniformity of system with other nations, or to the "balance of convenience," descent, and not locality of birth should be accepted as the primary source of nationality.

A few words remain to be said as to the recommendation of the Commissioners that "every child "born out of the dominions of the Crown, whose "father at the time of the birth was a British subject, "should be regarded by British law as by birth a "British subject, provided the father were born "within the dominions of the Crown, but not otherwise"*— in other words that where two generations have been born out of the dominions of Great Britain, British nationality shall be lost. This position can only be admitted where both generations have been settled in the country of birth. And this, probably, is what the Commissioners intend, as in another part of the report they say that "the "transmission of British nationality in *families settled* "*abroad* should be limited to the first generation." As has been shewn, it is only when, by reason of a family having become permanently settled in a foreign country, the presumption in favour of the nationality of descent being preferred fails, that it is justifiable to treat the descendant of a natural subject as other than a subject. And, even in the second

* Report, p. 9.

generation, the opposite presumption arising from continued domicile should be open to be rebutted by the declaration of the party, and an opportunity should be afforded to him to insist on the nationality of his fathers. The proposal of the Commissioners as it now stands would exclude the child of a British subject where, without any settlement in a foreign country, the child and grandchild of a British subject had been born out of the country during merely temporary residences abroad, or from merely accidental circumstances, without any intention on the part of either grandfather or father to abandon his country or cease to be a subject. It is plain that such a result ought not to be sanctioned.

SECTION 3. *Amendment as to Law of Allegiance.*

We have seen that, by the law of England, allegiance is indelible, and cannot be done away with, even with the assent of the Sovereign to whom it is due. We have seen that by the present law of every other European state, the nationality of origin may be put an end to; although in some countries the authorization of the Government may be required to prevent the act of the individual in denationalizing himself from being an offence against the State. It seems impossible that the present law of England can any longer be maintained. It is inconsistent with a due regard to the happiness and welfare of mankind to deny to every man the right of seeking a home where he may find readier and more profitable employment for his industry, or ampler scope for enter-

prise, or even institutions more congenial to his opinions or tastes. Independently of this consideration, the extent of emigration now constantly going on, if not with the actual encouragement, at all events with the tacit sanction of Governments, carries with it as a necessary consequence the right to sever the original relation of sovereign and subject, and to adopt a new nationality. It is computed that from 1816 to 1868, little more than half a century, six millions and a half of people have emigrated from Europe to the territories of the United States; and the stream of emigration still flows incessantly on.* Of the numbers whom the crowded state of the population of the old countries induces annually to seek new homes and fresh fields of enterprise in distant lands, a considerable portion find their way to North America, and of these a large proportion are emigrants from this country. Finding a home in the territory of the United States, these settlers owe allegiance to the country which receives and protects them, and which has a right to insist in return that they shall become its citizens, and be ready to defend its territories and uphold its institutions. It is in the highest degree unjust to refuse to persons so circumstanced the right of complete expatriation, and to withhold from them the right of severing the political ties which bind them to this country, and of transferring their allegiance to the State with which their own interests and those of their posterity are henceforth to be inseparably connected. Her

* Report of Committee of House of Representatives. Appendix to Report, p. 99.

Majesty's Commissioners are, therefore, well warranted in saying that "the doctrine of the common law is neither reasonable nor convenient," and in recommending that the law shall be placed on a different footing. The arguments on the subject are well summed up by the Commissioners, in the following passage of the Report, in which, speaking of the rule of the English law, they say :—

"It is at variance with those principles on which the rights and duties of a subject should be deemed to rest; it conflicts with that freedom of action which is now recognized as most conducive to the general good as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a State which allows to its subjects absolute freedom of emigration. It is inexpedient that British law should maintain in theory, or should by foreign nations be supposed to maintain in practice, any obligations which it cannot enforce and ought not to enforce if it could; and it is unfit that a country should remain subject to claims for protection on the part of persons who, so far as in them lies, have severed their connexion with it."

The position that a subject can throw off his allegiance and become the subject of another State must, however, be taken with some qualification. There are circumstances under which the right cannot be exercised without committing a crime against the law of the country which is abandoned. There are duties which a subject owes to his country, in return for the protection which it has so far afforded him. To violate these duties, or to abandon his own country in order to evade performance of them, should always constitute an offence for which, if found

within the jurisdiction and power of the original country, the expatriated subject should be liable to its law, and in respect of which naturalization by another State should afford no defence. Thus, where the subject, on attaining a certain age, is bound to military service, and leaves the country to avoid it—where a soldier on actual service deserts to the enemy—or where expatriation takes place in time of war to the enemy's country—offences are committed against the law of the country of origin, which cannot be purged by subsequent naturalization elsewhere. The Committee of the House of Representatives, in their report already referred to, vehemently as they uphold the doctrine of the dissolubility of allegiance, fully admit this doctrine.

"A subject," they say, "may justly be held to the complete performance of all obligations actually due to the Government at the time of separation. In a period of war, or when public peace is threatened, every form of political society is justified by natural as well as by municipal law in holding its members to the fulfilment of their duties until the crisis is past. In moments of public peril it might with justice forbid emigration so long as the common danger continued."

But ought this to have the effect of vitiating the naturalization which may ensue? Different opinions are entertained. The principle of the French law is at once dignified and wise. Far from holding to his allegiance the man who under such circumstances abandons his country, it treats him as unworthy to be numbered amongst its citizens, and as one whom it is undesirable to retain, while it punishes the delinquent

who is thus wanting in his duty to his country, if it afterwards finds him in its power, as it would punish a stranger who had committed an offence within its territory.

Another question presents itself before we pass away from this subject. We have seen that several States require prior residence, and some a declaration of intention to become a citizen, as a condition of naturalization. Shall a person who quits his own country, to take up his abode in a foreign one, with the intention of becoming a citizen of the latter, and of finally and for ever renouncing his own, still continue to be a subject of the old country during the probationary period which must elapse before he can be admitted as a subject of the new? The answer should unhesitatingly be in the negative,—at all events so long as the expatriated subject remains in the country to which he has voluntarily transferred himself. Some jurists, indeed, applying to nationality the principles of the law of domicile, contend that the old nationality is not put off till the new one is acquired. But it should be borne in mind, that the subject, who thus quits his country, "sans esprit de retour," and declares his intention to become the citizen of another State, has done all that in him lay to sever the ties that bound him to his original country; has removed himself from the sphere of its laws and its authority; has become in every sense, a useless and unprofitable subject. It seems unreasonable to say that, even in theory, a person so circumstanced can claim the protection to which, it must

be remembered, a subject is only entitled as the corresponding obligation to that of allegiance.

SECTION 4. *Amendments as to Naturalization.*

In considering what alteration is required in the law as to naturalization, it is necessary to consider first, the mode by which and the circumstances under which it may be acquired; secondly, what should be its effects. As to the first, assuredly nothing short of a public and authentic act, duly recorded and capable of being proved, ought to have the effect of changing nationality.*

Domicile,—which, in legal phraseology, is neither more nor less than a name for home, and the establishing of which may be said to be the settling in a given locality with a present intention of permanently abiding there,—has been suggested by some writers as sufficient to constitute a person a citizen of the country in which

* Publicity and ready means of proof of a change of nationality are of course most important in preventing disputes. Wherever, therefore, an option is afforded under given circumstances of electing between two nationalities, the individual exercising the option, should be bound to make a declaration before a Magistrate or other appointed authority, which declaration should be duly recorded. In this country such a declaration might be made before a Justice of Peace, and afterwards recorded at the Quarter Sessions, and a return might be made periodically to the Home Office.

If nationality should become, as it ought, matter of international concern, it would be highly expedient that an arrangement should be made for communicating the names of persons naturalized, or electing between two nationalities, to the agents of the States concerned, to be by them transmitted to their governments, so that no dispute as to the fact could afterwards arise.

it is established; and we have seen that, in some countries, the being domiciled for a certain period gives the right of citizenship. But this position is altogether inadmissible, and the Commissioners have done wisely to reject it. For, not only, as has been pointed out, is domicile a matter of judicial, and often of difficult inquiry, and therefore an element not to be introduced if it can be avoided, but it is quite possible for a person to have two domiciles, as where he divides his time so equally between two places of residence, that it is impossible to say that either of them is his principal residence.* Moreover, it by no means follows that because a person changes his domicile, even without any *animus revertendi*, he intends also to divest himself of his original nationality, and to transfer his allegiance to another country. From considerations of health or convenience, or predilection for a particular climate or locality, a man may quit his own country, intending to spend the rest of his life in a foreign land, and yet not have the remotest intention of changing his nationality. Jurists have for convenience, in determining a man's personal status or capacity, or in administering his effects, or in matters of testamentary disposition, looked to domicile as determining by what law a man's rights and liabilities should be ascertained. But it is a very different thing to make domicile determine the question of nationality. Indeed, it may be doubted

* See Phillimore on Domicile, ch. 3, p. 15. Story, Conflict of Laws, chap. 3.

whether jurists have not gone too far in giving weight to the fact of domicile, even in matters of personal property. In a recent case in the House of Lords,* Lord Cranworth and Lord Kingsdown held that, even for testamentary purposes, in order to lose a domicile of origin, and acquire a new one, a man must intend to change his nationality as well as his abode, or to use a phrase adopted by Lord Cranworth, *quatenus in illo exuere patriam.*†

"It is not enough," said Lord Cranworth, "that you merely mean to take another house in some other place, and that on account of your health, or for some reason, you think it tolerably certain that you had better remain there all the days of your life.. That does not signify; you do not lose your domicile of origin, or your resumed domicile, merely because you go to some other place that suits your health better; unless, indeed, you mean either on account of your health, or from some other motive, to cease to be a Scotchman and become an Englishman, or a Frenchman, or a German. In that case, if you give up everything you left behind you and establish yourself elsewhere, you may change your domicile. But it would be a most dangerous thing in this age, when persons are so much in the habit of going to a better climate on account of health, or to another country for a variety of reasons, for the education of their children, or from caprice, or for enjoyment, to say that by

* Moorhouse *v.* Lord, 10 Ho. of Lords Cases, 272.

† Lord Cranworth had previously held the same language in the prior case of Whicker *v.* Hume, 8 Ho. of Lords Cases, p. 159.

going and living elsewhere, still retaining all your possessions here, and keeping up your house in the country, you make yourself a foreigner instead of a native. It is quite clear that that is quite inconsistent with all the modern improved views of domicile."

If this doctrine applies to civil rights, it will obviously apply with still greater force to the matter of nationality and the political rights which are involved therein.

Lastly, a reason for not permitting domicile of itself to confer nationality is that this has the effect of excluding the exercise of that judgment which ought always to be exercised by the proper State authority as to whether a person applying to be naturalized is, with reference to character and other circumstances, one who ought to be admitted to the status of a subject.

Yet, though domicile may not be sufficient to confer nationality, there can be little doubt that it ought to be a preliminary condition to naturalization, as no one can have any claim to be admitted, or ought to be admitted, to the status of a subject, who does not settle permanently in the country and identify his own interests with those of the community.

But while it may be right to insist on actual domicile as a condition of naturalization, the question whether any period of prior residence should also be required admits of a different consideration. Her Majesty's Commissioners have recommended that in order to be naturalized a person shall have resided for two years. Prior residence is no doubt exacted in

most of the foreign States; but the tendency of recent legislation has been materially to reduce the time; and whether such residence should be made an absolute condition precedent is open to considerable doubt. The value of prior residence is only that it affords a test of the sincerity of the intention to settle permanently in the country; and in this point of view, it is, no doubt, a circumstance material to be taken into account in ordinary cases, in determining whether naturalization should be granted. But instances may frequently occur in which the intention on the part of a person seeking to be naturalized to remain permanently in the country may be abundantly manifest, notwithstanding his settlement in it may have been recent. The acquisition of real estate, by purchase, inheritance, or marriage, the establishment of a manufacture or trade, coupled with willingness to submit to the loss of the nationality of origin, which ought always, under any sound system, to attend on naturalization, may be sufficient to satisfy the Officer of State, to whom the authority to grant naturalization is intrusted, of the propriety of admitting the party to the status of a subject, notwithstanding the absence of prior residence. In such cases the condition of prior residence would seem to be superfluous, and the expediency of the recommendation of the Commissioners that a prior residence of two years should be uniformly required appears more than doubtful. At all events, there should be a discretionary power to dispense with it in certain cases.

The condition of continuing residence, such as is

now required on naturalization in this country, is equally unnecessary, so long as the acquired nationality continues and is not superseded by a return to that of origin or by naturalization elsewhere. A naturalized subject may have the same motives for changing his residence as the natural born subject, and ought to be treated in all respects on the same footing. To insist, therefore, on continuing residence, would be to treat the adopted subject in a harsh and illiberal spirit, and appears wholly uncalled for. It is not recommended by the Commissioners that this condition shall be retained.

We have next to consider what should be the effect of naturalization, and this with reference to its operation, first, as to the former nationality, and secondly, as to that to be acquired. And as to both the effect must be considered with reference not only to the individual himself, but also to the members of his family if he has one.

Assuming that it shall be competent to every one to transfer his allegiance from his parent country to another willing to receive him, the effect of naturalization ought, by the common law of nations, to be everywhere to supersede and entirely put an end to the nationality of origin, even where by expatriating himself the subject has offended against the law of the original country and may remain amenable to punishment should he return to it. It is only by a comity of legislation in this respect that the desirable object of preventing a double nationality can be accomplished.

Next, as to the status and rights acquired. We have seen that while, in all other countries, full nationality is acquired by naturalization, though in some the higher political rights are withheld, by the present practice in this country, the character of a British subject fails to accompany the naturalized subject beyond the confines of the realm; so that, with the exception of being capable of voting at parliamentary and municipal elections, the effect is limited to the removal of civil disabilities.

But why, when other nations are liberally inviting foreigners to become subjects and citizens, should Great Britain decline to receive, on the same footing as other nations receive foreigners into their ranks, persons from other countries, who desire to place their fortunes, their capital, their industry among us, and who may become profitable and creditable members of the community? Why say to the subject whom you naturalize "We cannot trust you with the character of a British subject beyond our own shores, lest you should involve us in trouble or controversy?"

If the restrictions in respect of civil rights, which now operate to the prejudice of the foreigner, shall be removed, and naturalization be granted only to such aliens as really intend to become permanently, and to all intents and purposes, British subjects, citizenship in the full sense of the term should be conferred by naturalization, as it used to be conferred by Act of Parliament, before an idle jealousy of foreigners introduced unnecessary restrictions, and a timid appre-

hension of the embarrassment which a double nationality might give rise to, led to this singular species of naturalization, which, while it causes the original nationality of the alien to be forfeited, fails to give him, in substance and reality, that of this country in return. Her Majesty's Commissioners have recommended that the present practice shall be discontinued, and that in future all the rights of a British subject shall follow on naturalization; and it is to be hoped that this recommendation will be carried into effect. Even as regards political rights it would be difficult to suggest any ground why a naturalized subject should not enjoy the same rights as the natural born subject. If a naturalized subject should occupy such a social position, or exhibit such capacity for public business as to make a parliamentary constituency desire him for its representative, or that Her Majesty should be pleased to appoint him a member of the Privy Council or to an office of trust, it may be presumed that his presence will be an accession to the public councils, or that his services will be useful to the State. Even if any ground existed for a distrust of naturalized aliens as members of the national councils or as holding offices of trust, it is impossible that the number thus returned to Parliament or employed in the public service can ever be sufficiently large to have the slightest effect on the national interests. On the other hand, it is desirable to attach the newly admitted subject as much as possible to the country of adoption, and not to leave room for any feeling of hardship or wrong arising

from a sense of illiberal jealousy or ungenerous distrust.

The difference between denization and naturalization has already been pointed out. It appears that, though denization has fallen into comparative desuetude, it is still occasionally resorted to. Should it be deemed expedient to continue to employ this process for conferring the status and rights of a subject, the same effects should in all respects follow from it as will result from naturalization.

Next as to the family of the party naturalized. And first as to the wife. Jurists are divided as to whether the wife should lose her former nationality when the husband changes his. Monsieur Fælix asserts the affirmative. His learned editor, Monsieur Demangeat, citing several French jurists, maintains the reverse.* The question, however seems scarcely to admit of serious discussion. The identity of interest which exists between husband and wife, and which leads in the foreign law to the general rule—a rule which ought to be adopted in our own—that the nationality of the wife shall follow that of the husband, must apply as much to a substituted nationality as to that of origin. The consent

* Droit International, vol. i. p. 93, n. (*a*). On the discussion of Article 214 of the Code Civil in the Council of State, Napoleon is reported to have said on this subject, "Il y a une grande différence entre une Française qui épouse un étranger et une Française qui, ayant épousé un Français, suit son mari lorsqu'il s'expatrie: la première par son mariage a renoncé à ses droits civils; l'autre ne les perdrait que pour avoir fait son devoir."

given by the wife on marriage to exchange her nationality for that of the husband may be taken as equally applying to any nationality which he may afterwards acquire in the place of the former one. Besides which, it may fairly be assumed that, in the vast majority of instances, the wife is as much a party to the expatriation as the husband.

As regards the children, those born after the naturalization should of course follow the nationality of the father. Of those born before, a distinction should be made between those who accompany the father to the new country and those who do not. The latter should retain their nationality of origin. As regards the former, a distinction is again to be made between those who have attained their majority and those who have not. Those who are still minors, and who as such are still subject to the authority of the father and form part of his family, must be taken, at all events for the time, to follow his nationality; and as it may fairly be presumed that they will in the future remain in the new country and desire to become its citizens, they should be deemed to be such in the absence of any declaration to the contrary. But, inasmuch as by their birth they have acquired a right to the nationality of the country of birth, it ought not to be in the power of the parent to deprive them of it, if, on arriving at full age, they desire to retain it; and a reasonable time should be allowed them to reject the nationality acquired by the father, and to claim that the former country, without being subjected to the

necessity of becoming naturalized in it. The proposal of the Commissioners that, on the naturalization of the father, the children, if minors, shall necessarily assume the new nationality, ignores this right, which should, it is submitted, be respected so far as to afford the option above suggested.

Children who, at the time of the father's naturalization, have attained their majority, being *sui juris*, and capable of exercising their own judgment, and at the same time capable of being themselves naturalized, should be left free to follow their own course; unless, indeed, it should be thought that, if still continuing to form part of the father's family, they should be allowed (as is provided by the law of France) within a certain period after the naturalization of the father, to claim to become subjects of the new country on settling themselves therein, without the necessity of being naturalized. Thus the distinction between the children forming part of the father's family who are minors, and those who are not, would be that the former would have to declare their rejection of the citizenship of the new country if they desired to retain that of the old; the latter would have to declare their election to adopt that of the new, if they desired to acquire it.

When a woman by the death of her husband becomes the head of the family, her naturalization should carry with it the same consequences, as regards the children, as would have attended that of the father had he been living.

CHAPTER VII.

CONCLUSION.

THE results at which we appear to have arrived are these:—

1. That under a sound system of international law such a thing as a double nationality should not be suffered to exist.

2. That nationality of origin should be derived from descent alone; except in the case of children born of foreigners domiciled in the country of such childrens' birth—in the first generation, on a claim being made within a fixed period after attaining majority—in the second in the absence of a declaration that they desire not to become subjects. But in both these instances, in order to avoid the evil of a double nationality, the right should be given only where a corresponding law exists in the country of the foreign parent.

3. That it should be free to every one to expatriate and denationalize himself, and to transfer his allegiance to another country.

4. That the effect of naturalization should be to do away altogether with the prior nationality.

5. That emigration with the intention of expatriation and of becoming a citizen of another State should have the effect of putting an end to the relation of subject, unless, prior to naturalization, the party should abandon the intention of becoming naturalized

in the foreign country and return to the country of origin with the intention of remaining in it and of resuming the character and status of subject.

6. That, though prior residence may properly form an element in the consideration whether a person should be admitted to be naturalized, no absolute condition should be attached to naturalization, except that of actual *bonâ fide* domicile at the time of admission.

7. That, in respect of civil rights, with the single exception of the ownership of British shipping, for which settled residence, or even a license, should be required, aliens should be placed on the same footing as subjects, without any reference to the principle of reciprocity.

8. That, as no one should be admitted to be naturalized except such persons as intend to settle finally in the country and to identify themselves with its interests, it is advisable to admit the naturalized alien to full political as well as civil rights, on the footing of an ordinary subject, making no distinction between his status as a subject at home and abroad.

9. That the nationality of the children of a person thus changing his country, if born after his naturalization, should follow that of the father. If born before, and minors, they should be subjects of the new country, with a right, however, of disclaiming its citizenship within a given period. If of age, but still forming part of the father's family, they should be at liberty, on declaring their desire, to participate in the newly acquired nationality.

10. That the nationality of a married woman should always follow that of the husband, whether original or acquired, but on widowhood a woman should be entitled to resume her original nationality on returning and settling in her former country.

By a system of law, founded upon and giving effect to these principles, aliens would be placed on the footing which a generous comity should dictate; the inconvenience of a double nationality would be prevented; every one would know where his allegiance was due, without being exposed to the danger of having conflicting claims made on it, and if in need of protection, would know where to look for it; governments would not be troubled by claims for protection involving doubtful and embarrassing questions of nationality; every one would be at liberty to act upon the maxim *ubi bene, ibi patria*, and to seek fortune and happiness where he thought he was most likely to find it; and Governments might receive eligible citizens into the community without the fear of troublesome disputes or collision with other powers.

Much of what is here proposed, looking to what is now the law of other nations, might be effected by our own legislation; and the comity which should exist among nations, not merely in the administration of the law, but, as to matters of common interest and concern, in legislation also, would probably induce other States to meet in a corresponding spirit the efforts which Her Majesty's Commissioners wisely

recommend to be made to settle this department of international law on principles of reciprocity, and would lead them to assist in bringing uniformity and order into it, so as to prevent the possibility of future dispute or conflict on questions of nationality.

THE END.

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